No. 12,665.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

EL-O-PATHIC PHARMACY, a corporation, MARTIN A. CLEMENS, an individual, and VITA PHARMACALS, INC., a corporation,

Appellees.

UNITED STATES OF AMERICA,

Appellant,

vs.

HUDSON PRODUCTS COMPANY, a corporation, and its subsidiary firm doing business under the fictitious name and style, MAYWOOD PHARMACALS COMPANY, and ALLEN H. PARKINSON, an individual,

Appellees.

On Appeal From the United States District Court for the Southern District of California Central Division

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BRIEF OF APPELLEES.

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BRIEF OF APPELLEES.

PRELIMINARY STATEMENT.

Appellees accept the statement of jurisdiction in Appellant's brief, without, however, admitting by inference or otherwise that the trial court was in error in denying the Government's application for a preliminary injunction. These cases are not, as Appellant would have it, "an offshoot of previous criminal cases involving the same defendants," as stated on page 2 of Appellant's Brief. There were criminal actions previously instituted against defendants involving labeling wholly foreign and entirely different from any of the labeling before this court. These criminal cases resulted in a judgment of conviction and the imposition of nominal fines *because of the labeling involved* in each case. As will be pointed out later in this brief, following the judgments in those cases the labeling was completely revised and it is that labeling which is the subject of the injunction cases which are before this court.

It was stipulated in both cases "in order that this case may be disposed of as quickly as possible" [R. 150, 266], the record in the court below should consist of the affidavits filed in these injunction actions as well as the informations and transcript of testimony, including exhibits in the criminal cases.

As will be shown, in view of the issues raised by the pleadings in these cases, the court was called upon to determine from the record, included in the stipulations above referred to, whether by force of that evidence the Government had sustained its burden of proof *with respect to the labeling involved herein.* It is not true, as Appellant has stated on page 34 of its brief, that the refusal of the court to grant a permanent injunction against the defendants "has nullified the convictions in the criminal cases." We repeat again—the convictions in the criminal cases were based upon the labeling before the court there which was wholly different than that before the court in this case.

The labeling in the *Parkinson* criminal case contained a warning statement. No charge was made in that case that it was insufficient. The labeling in the *El-O-Pathic* case did not involve a warning statement and the court decided that that fact misbranded the drug.

It was not contended in either of those cases (as it is now) that under a proper interpretation of the Federal Food, Drug and Cosmetic Act, the drugs here involved may not be sold except upon prescription. That point is argued for the first time in these injunction cases and it is significant that if the Government were sincere in their theory as it now comes to light, the charge would have been made in the informations in the criminal cases, as well as in the Complaints in these injunction cases; that the Act

was violated in that these drugs were sold without a prescription. This contention was not made nor was it pleaded for the very obvious reason that there is nothing in the Act which provides that it is violated if certain drugs are sold without a prescription. As we shall point out, the only requirement so far as pertinent here is that the labeling shall bear adequate directions for use and shall bear adequate warnings. If this requirement is complied with, the authority is not given the Government to contend as they do here that the directions for use are inadequate and the warning statements are inadequate because, in the opinion of the Government, a drug should only be sold on prescription and therefore no directions for use or warning statements can be adequate and that whether or not an individual has sought to exempt himself from the requirement that he state adequate directions for use and gave adequate warnings he must nevertheless come within the exempted class if in the opinion of the Food and Drug Administration he should be exempt.

We have prepared as an appendix to this brief a résumé of the pleadings and the evidence which was before the trial court, in these injunction cases so far as it is pertinent to the questions which this court is called upon to determine. We have stated it in narrative form as we believe it much easier reading set out in that fashion than simply to refer the court to the record in which the evidence appears in question and answer form. Also in the Appendix will be found the legislative history of the provisions of the Act here in question and the so-called "Durham-Humphrey Bill" pending in Congress, which bill seeks to give the Food and Drug Administration the authority they contend in this case the Act already gives them.

II.
STATEMENT OF THE CASE.

A. THE PLEADINGS.

1. The Pleadings in Case No. 10266-HW (the El-O-Pathic or Clemens Case).

The complaint alleges that the defendants distributed methyl testosterone tablets, 10 milligrams and 25 milligrams, and in linguet form, 5 and 10 milligrams, and various preparations of female hormone drugs [App. 1; R. 3]. The labeling used is set forth in full in the Appendix [App. 1-2; R. 4]. It was charged that the shipment in interstate commerce of these drugs constituted a violation of Section 502(f)(1) of the Act (21 U. S. C. 352(f)(1)) in that the labeling failed to bear adequate directions for use in failing to state all of the diseases or conditions for which the drug was contended; that Section 502(f)(2) of the Act (21 U. S. C. 352(f)(2)) was violated in that the labeling failed to bear adequate warnings against use in certain pathological conditions where its use may be dangerous to health; that Section 502(j) of the Act (21 U. S. C. 352(j)) was violated in that the product was dangerous to health when used in the dosage and with the frequency prescribed, etc., in the labeling [App. 3; R. 6]; that Section 301(a) of the Act (21 U. S. C. 351(a)) was violated because the 5 milligram linguets were ineffective for the treatment of a male hormone deficiency [App. 3; R. 7].

The answer in substance denied all of the material allegations of the complaint and attached to it as Exhibit "A" the labeling employed [App. 4; R. 35].

2. The Pleadings in Case No. 10391-HW (the Hudson Products Company or Parkinson Case).

The complaint in this case was essentially the same as in Action No. 10266-HW [App. 4]. However, no temporary restraining order was applied for and it was not alleged that these defendants sold the 25 milligram product. The answer in this case in substance denied the allegations of the complaint [App. 4; R. 179].

B. THE FACTS.

On page 2 of Appellant's brief, the so-called "medical facts" are stated which Appellant would have this court believe were the medical facts before the court below. Appellant has adriotly omitted, however, to state any of the medical facts except those which they apparently believe to weigh in their favor. The court below, however, had before it *all* of the testimony and decided that the Government had not sustained its burden of proof.

This testimony before the lower court is set out in the Appendix to this brief. The trial court after reviewing all of this evidence in the light of the issues framed by the pleadings, and in the light of the labeling involved in these injunction actions, decided that the directions for use contained on this labeling were adequate, that the warning statements were adequate and that the plaintiff had failed to sustain the burden of proof of showing that they were inadequate.

By stipulation in the consolidated injunction cases [R. 150, 266], the record before the trial court consisted of the affidavits referred to in the Appendix to this brief, and the testimony in the transcript of the trial in the criminal proceedings, which testimony is set forth in narrative form on pages 8-42, 61 of the Appendix.

Robert S. Roe, Chief of the Los Angeles District of the Food and Drug Administration, executed an affidavit in Case No. 10266-HW, attaching a letter from one of the manufacturers of the product involved, addressed to all distributors of the product and which was received by the defendants in that action and concludes that these defendants were warned thereby of the "dangers" incident to the sale of the product without prescription [App. 5; R. 20].

With reference to Action No. 10391-HW—the Hudson Products case—it was stipulated that none of the evidence in the transcript of testimony pertaining to the alleged "danger" of using testosterone was introduced as against the defendants in that action at the criminal trial and no charge was made by the Government in that action that the warning statements on the labeling involved in that action—No. 20642, Criminal—was inadequate [App. 6; R. 266].

The testimony of Dr. Thienes appears in the transcript of testimony [App. 8; R. 344]. In substance that testimony was that it is the consensus of opinion as he understands it, and his opinion, that testosterone may accelerate the growth of cancer of the prostate and may induce sterility, that it is ineffective in the treatment of certain symptoms or conditions unless they are caused by a male hormone deficiency, which is a very rare condition, and that he believes that the general practitioner today would conduct detailed tests to determine whether that condition existed before prescribing the product. To avoid unnecessary repetition, we refer the court not only to the testimony of Dr. Thienes, but as well to all of the facts set forth in the Appendix.

Dr. Warren Nelson [App. 10; R. 396], connected with the University of Iowa, had conducted tests to determine the effect of testosterone on fertility. He stated that there was a possibility of testosterone decreasing fertility and this conclusion was drawn from experiments made by him at the University; also that the method of approach used by those in experimental institutions was considerably different than the approach employed by the general practitioner.

Dr. Heckel [App. 12; R. 463], likewise stated that testosterone would, in his opinion, accelerate the growth of a cancer of the prostate, but he stated that it would also cause sterility contrary to what Dr. Nelson stated; that testosterone is of immeasurable value in the treatment of flushes, sweats and all of the symptoms and conditions called to his attention, provided that they were caused by a male hormone deficiency which, in his opinion, was very rare and he did not know how to diagnose it; that the incidence of the male climacteric was a very rare thing. He went into great detail concerning the elaborate tests that were necessary before prescribing testosterone and stated that if after making all of these tests a general practitioner found nothing to contra-indicate the use of testosterone *"he might but he shouldn't"* suggest the product to the patient for a period of time to see whether he was relieved.

Dr. Belt [App. 15; R. 514], is a urologist and stated that in his opinion methyl testosterone will accelerate the growth of a cancer of the prostate and he gave instances which he stated in his opinion cancer of the prostate was accelerated in growth by the drug. In many instances it is very valuable but elaborate tests concerning which he went into great detail were necessary as a prerequisite

except in the cases of young individuals known as hypogonads, or in the case of castrates, but that even after a careful examination of the patient, with no indication of cancer of the prostate present, it would still be dangerous and conducive to the development of such a cancer for the individual to take it. If a person called upon a general practitioner and complained of the various symptoms referred to by him before prescribing testosterone, he would think about the problem and if he thought much about it he wouldn't prescribe it. There would be no blood tests to determine the presence of cancer unless he wished to do the acid and alkaline phosphatase test and the urine test would not show anything unless he wished to take the 17 ketosteroids test which consumed a period of about a week to complete. The problem of hormone deficiency is that of the general practitioner and the middle aged man who is tired and worn out and comes to see the doctor for help is his "meat." He does not think that there is such a thing as the male climacteric and believes that most careful observers are of the same opinion, though it is not universally shared by the profession.

Dr. Charles Huggins [App. 18; R. 540] is a professor of urology at the University of Chicago and is a professional investigator. He does not believe that a male hormone deficiency occurs except in people who are hypogonads or castrates. He believes that it will accelerate the growth of cancer of the prostate. The ordinary physician is not capable of conducting blood tests but a hospital is. There is a difference of opinion on the subject in medical circles whether there is such a thing as the male climacteric and many articles are found in the literature in which the subject is discussed, but he does not agree with those investigators. His attention was called to three articles

by different doctors appearing in various scientific journals. He disagreed with all and, as to one, he stated that the statements of the author were "absurd."

As shown by the facts in the Appendix, pages 21-27; 28-30, inclusive, Drs. Belt and Heckel did not in actual practice give the tests nor do what they said was necessary prior to prescribing testosterone. The impeaching testimony of these doctors was given by three individuals whose testimony appears on pages 21, 27 and 28 of the Appendix. The effort of these doctors to rebut that impeaching testimony will be stated here in order that a full appraisal may be given at the same time by the court.

Allen H. Parkinson went to Dr. Belt's office the day after Dr. Belt testified as above related, stated that he had been referred to that office by a doctor in Salt Lake, that he had been troubled with diminishing of the testes and penis and wanted some testosterone. Dr. Belt interviewed him, and a blood and urine sample was taken. He was injected with 50 milligrams of testosterone, was asked by Dr. Belt how many tablets of testosterone he wished and obtained a prescription for 100 ten milligram tablets, was told that the charge was $5.00, which he paid [App. 21; R. 866].

Dr. Belt then gave him a brief rectal examination and that was all of the examination given.

On rebuttal Dr. Belt stated that if a person comes to him from another doctor for some drugs, he always allows the other physician the benefit of whatever doubt might exist in his mind and he goes on with the original treatment until he is able to communicate with the doctor and discuss the problem with him [App. 22; R. 692, 938]. He stated that he examined Parkinson on the day men-

tioned by the latter and testified from notes as to the examination given, and that Parkinson had said that another doctor had referred him and he asked for a prescription of 10 milligrams of the product. He said that he made a complete physical examination; examined his eyes, pupils, his pharynx, his teeth, felt his thyroid, examined his thorax, took his blood pressure, determined his pulse rate and rhythm, felt his abdomen, looked at his extremities, tapped his reflexes. The notes from which the doctor was reading were read into evidence and we refer the court thereto [App. 25; R. 943], where it will be noted no reference was made to any of the tests which the doctor stated he had given.

Hannah Shinglman went to Dr. Belt's office in Beverly Hills, which was the Elmer Belt Urological Group, Dr. Norman LeTourneau was one of the members of this group. She asked to see Dr. Belt, was told that he was not there and was referred to Dr. LeTourneau. She told him that her husband had come from Chicago and that a doctor in that city had been giving him testosterone as her husband was going through the male change. Her husband was not with her. Dr. LeTourneau gave her a prescription for those tablets and she left [App. 27; R. 892].

On rebuttal Dr. LeTourneau admitted giving the prescription to her and that her husband was not present [App. 28; R. 947].

Hazen S. Parkinson arrived in Chicago June 27, 1949, shortly after Dr. Heckel had testified in this case. He asked to see Dr. Heckel, showed him a bottle the label of which indicated that it had contained 500 five milligram linguets of testosterone and told him he wanted a refill,

that he was going on a ship and would be gone for a long time [App. 28; R. 898]. Nothing was said by the doctor on the subject of fertility. He had Mr. Parkinson urinate in a glass and placed his finger in Mr. Parkinson's rectum and then wrote out the prescription. He told the doctor that he wanted 500 tablets because some of the men on the ship on which he was going would like to have some. He was in the doctor's office five or six minutes. At the time of his visit he was 65 years old and told the doctor that he wanted enough testosterone for a year. The prescription written by the doctor was for 500 five milligram linguets.

In the interests of saving time, counsel for the defendants stipulated with the Government that if Dr. Heckel were called on rebuttal he would testify in accordance with the letter sent by him to Government counsel following Mr. Parkinson's visit to him, which stipulated in part that Mr. Parkinson came to his office in Chicago [App. 30; R. 923] and stated that he had been referred to by a former patient. Parkinson said that he was 72 years of age, a sailor by occupation and gone from the country for long periods of time; that his doctor in Salt Lake City had been giving him a prescription for methyl testosterone and that he had been taking this drug under his doctor's direction for the past several years. Dr. Heckel then made a physical examination of Parkinson, which included a urine analysis and a rectal examination of the prostate and found no contraindication to the use of testosterone.

Allen H. Parkinson and Hazen S. Parkinson [App. 31; R. 870, 902, 269] both testified that during the course of the trial in the criminal action they called upon general practitioners, asked for and received a prescription for

testosterone linguets. Allen H. Parkinson called on one and Hazen S. Parkinson called on fifteen doctors located in the metropolitan areas in Los Angeles and Long Beach; that they were not refused the requested prescriptions from any doctor upon whom they called and that none of the doctors so much as laid a hand upon either prior to writing out the prescription.

Dr. William A. Swim [App. 34; R. 835] a defense witness, has been practicing in Los Angeles for thirty years, specializing in internal medicine and was formerly a member of the Board of Medical Examiners of California; he has found many males in middle life who suffer from symptoms which he described and which he associates with the male climacteric; in connection therewith he prescribes testosterone to see whether the symptoms are relieved. He has never encountered any adverse results from the use of the product. He does not conduct the elaborate tests referred to by the Government witnesses prior to prescribing the product and knows of no other doctor who does so. He prescribes it about once a week and he knows of no instance in which a biopsy of the testes is conducted to determine the effect of testosterone, except possibly in experimental institutions.

Dr. George E. Fakehany [App. 37; R. 740], a defense witness, graduated with the degree of M. D. *cum laude*. He is medical consultant for Technicolor Motion Picture Corporation, Samuel Goldwyn Studios and Radio Corporation of America. He does not conduct the elaborate tests mentioned by the Government witnesses prior to prescribing testosterone and has had no adverse results from the use of the product. The literature as to whether testosterone will accelerate the growth of such a cancer

is in confusion and the views of the investigators are not uniform. When a man calls upon him and complains of the symptoms referred to by all of the witnesses, he prescribes testosterone for a period of time to see whether he is relieved. He knows of no doctors in this locality who give the tests mentioned by the Government witnesses.

Dr. Paul E. Travis [App. 39; R. 788], a defense witness, graduated from the University of Southern California, Phi Beta Kappa. Was in the service for two years in the Veterans Hospital, Arizona, and used testosterone at that hospital for men who complained of the symptoms subject of all of the witnesses. He does not, and knows of no other doctors in general practice who conduct the elaborate tests testified to by the Government witnesses and he has never encountered any adverse results in the use of the product. He has read the literature on the subject and as to the effect of testosterone in its relationship to cancer of the prostate are confusing and the articles are pro and con on the subject.

An affidavit was filed [App. 42; R. 55] by the defendant, Martin A. Clemens, and his affidavit is part of the record under the stipulation referred to, in which he stated the vast number of tablets of testosterone sold by him. He also set forth the reasons for revising the label following the judgment in the criminal action so as to conform to the evidence of the Government witnesses and thus meet any objections made by the Government to the labeling of such a product. He quoted from standard medical works, including the United States Pharmacopoeia, showing that the dosage for testosterone recommended by those publications was 5 milligrams, this to refute the Government's contention that 5 milligrams had no therapeutic value.

Allen H. Parkinson likewise filed an affidavit [App. 47; R. 199] which under the stipulation mentioned was part of the record before the trial court. He likewise analyzed the counts in the information in the criminal action against him and the reason for the complete relabeling of the product so as to conform to the objections made by the Government during the course of the criminal trial. He also referred to the recommended dosage from standard medical works such as was done in the Clemens affidavit. He then referred to circulars mailed by him to retail druggists following the revised labeling and an exchange of correspondence between the Southern California Pharmaceutical Association and the Chief of the Los Angeles District of the Food and Drug Administration while the injunction suit against him was pending and pointed out that in the letter from the said Chief the view was expressed that the sale of this product, regardless of the labeling, violated the Food and Drug Act but no mention being made of the pendency of the case in which that question was in issue.

Eugene M. Elson, defense counsel, filed an affidavit [App. 53; R. 49] setting forth excerpts from the file in an action, *United States v. Walter Kurt Max Hassenstein,* No. 19004, Criminal, in the United States District Court, the purpose of this affidavit being to bring before the court a prior case in which labeling somewhat comparable to that involved herein was approved by the court as bearing adequate directions for use and warnings.

Rebuttal evidence offered by the plaintiff consisted of affidavits of employees of the Food and Drug Administration and the testimony of one doctor. One of these affidavits concerned purchases in August, 1949, from the place of business of the defendant, Vita-Pharmacals, and

the request of the salesman that he furnish his name and address in order that he might be informed as to new products [App. 57; R. 120]. A similar affidavit was executed by Albert H. Wells [App. 58; R. 131], a chemist of the Food and Drug Administration, concerning purchases by him in November, 1949. A supplemental affidavit was executed by Robert S. Roe [App. 58; R. 136] concerning investigations to determine whether the revised labeling caused purchasers to consult physicians before taking the drug and attaching thereto affidavits of individuals interviewed.

An affidavit was executed by Walter F. McRae [App. 59; R. 126], acting Chief of the Los Angeles District, Food and Drug Administration, in rebuttal to a supplemental affidavit of the defendant, Clemens, concerning certain patent medicines and alleging that a seizure action was pending against one of these products and that another was under investigation, that the State Board of Pharmacy in January, 1950, had been requested to hold hearings and classify testosterone as a dangerous drug in California, to be sold only under prescription.

Dr. Elwyn Terrill [App. 61; R. 924] testified in the criminal actions that he was in general practice and did not prescribe testosterone except after giving detailed examinations and that he knows of no doctors in his circle of acquaintances who prescribe it without such examinations.

It was stipulated at the trial of the criminal actions that both parties could produce additional general practitioners who would serve to corroborate the testimony of the defense witnesses and others to corroborate the testimony of Dr. Terrill [App. 33; R. 929].

C. THE QUESTIONS INVOLVED.

We do not concur in the statement of the questions involved as set forth in Appellant's brief. The questions thus stated assume facts contrary to those found by the trial court. The facts assumed in Appellant's questions were the facts which were unsuccessfully contended for by Appellant in the trial court. We conceive the questions involved to be as follows:

1. Is Section 502(f)(1) of the Act (21 U. S. C. 352 (f)(1)) susceptible of the interpretation that the Food and Drug Administration may not only *exempt* certain drugs from the requirement that they bear "adequate directions for use," but as well determine that for some drugs adequate directions for use cannot be composed and *restrict* the sale of such drugs to sale by prescription only.

2. Does the evidence support the finding that the labeling involved herein bears adequate directions for use within the meaning of Section 502(f)(1) of the Act (21 U. S. C. 352(f)(1)).

3. Does the evidence support the finding labeling involved herein bear adequate warnings as required by Section 502(f)(2) of the Act (21 U. S. C. 352(f)(2)).

4. Does the evidence support the finding that methyl testosterone, tablets and linguets of 5, 10 and 25 milligrams, are not dangerous to health when used in the dosage or with the frequency or duration prescribed, recommended or suggested in the labeling within the meaning of Section 502(j) of the Act (21 U. S. C. 352(j)).

5. Does the evidence support the finding that the labeling involved does not violate Section 502(a) of the Act (21 U. S. C. 352(a)) in that methyl testosterone linguets of 5 milligrams does have therapeutic value in the treatment of a male hormone deficiency.

III.
SUMMARY OF ARGUMENT.

The trial court found the directions for use and the warning statements to be adequate and in compliance with Section 502 (21 U. S. C. 352) of the Act [R. 158, 274], that there was medical opinion on both sides as to whether there were ill-effects from the taking of these drugs, that they were not dangerous to health when taken as directed in the labeling and that the plaintiff had not sustained its burden of proof with respect to the allegations in effect [R. 158, 274].

The medical opinion appearing in the record, taken in connection with the conclusive impeachment of two of the Government witnesses, was convincing that medical opinion amongst professional investigators and experimenters is divided as to whether testosterone may accelerate the growth of cancer of the prostate or produce a temporary degree of fertility.

The individual who complains of the symptoms usually associated with the male climacteric, *i. e.,* flushes, sweats, nervousness, inability to concentrate on activities and a tendency to evade them, etc., invariably calls upon the doctor in general practice who does not associate with these drugs the danger to his patient in the particulars mentioned or conduct other than the most cursory examination before prescribing them.

The individual purchasing such a drug, labeled as the products here involved were labeled, is afforded directions for use and warnings, if any are needed. far more adequate than he would obtain from the general practicing doctor upon whom he would call.

Section 502(f) of the Act (21 U. S. C. 352(f)) simply requires that all drugs be labeled with adequate directions

for use and adequate warnings. This section, as shown by the legislative history preceding its adoption, means that with appropriate directions for use and adequate warnings, a drug may be sold without the actual prescription of a physician and that the Act is not susceptible of the interpretation as contended for by Appellant, that if the Food and Drug Administration should decide that a particular drug should not be sold except on prescription, that person must then come within the exemption mentioned in Section 502(f) and comply with the regulations which would exempt him from the requirement that his labeling bear adequate directions and warnings for use whether or not he has applied for or sought to come within the exempted class.

The administrative interpretation adopted by the Food and Drug Administration with respect to directions for use and warnings, viewed in connection with products which have been on the market for many, many years, involves the conclusion that the directions for use and the warnings on the labeling involved herein are adequate and comply with the provisions of the Food and Drug Act. The contention of the Government that the Food and Drug Administration may determine not only the manner in which a drug must be labeled, but whether it may be labeled at all, and whether it must be sold solely under prescription, is not only contrary to the intent of Congress but attempts to vest in that administration the power to select any drug, *i. e.*, aspirin or simple laxatives, and decree that they may only be sold upon prescription.

The authority contended for by the Appellant in this case is precisely the authority sought by S. 3852—the Durham-Humphrey Bill—included in the Appendix to this brief, and introduced in June 1950, at the 81st Congress, Second Session, one of the supporters of the bill being the Food and Drug Administration.

IV.
ARGUMENT.

A. SCOPE OF REVIEW.

The Government takes the position on page 35 of their brief that the scope of review by this court is "*de novo* since the judgments of the district court were based entirely upon a stipulated written record."

It seems to us that it hardly lies with the Government to advance an argument of this kind when one considers that the stipulations as to the record [R. 150, 266] were entered into in order that these cases "may be disposed of as quickly as possible." It was agreed between both counsel that if oral testimony was to be adduced, the same witnesses who had testified in the preceding criminal cases would be called upon to testify and to a large extent their testimony would be the same. This was considered to be a needless waste of time and expense, hence the stipulation. There was no thought in the mind of counsel for the defendants, and certainly in the open discussions preceding the preparation of these stipulations no intimation whatever was made by counsel for the Government that it was intended that the review by this court should be any different than a case where findings had been made upon oral testimony.

Be that as it may, *Equitable Life Assurance Society v. Irelan,* 123 F. 2d 462 (9th Cir., 1941); *Stork Restaurant Inc. v. Sahiti et al.,* 166 F. 2d 348 (9th Cir., 1948), and *Murphy et al. v. United States,* 179 F. 2d 743 (9th Cir., 1950), involved *depositions. Orvis v. Higgins,* 180 F. 2d 537 (2nd Cir., 1950) involved, for the most part, *undisputed facts. Blackner v. McDermott,* 176 F. 2d 498 (10th Cir., 1949) involved *stipulated facts,* and *United States v.*

United States Gypsum Co. et al., 333 U. S. 364 (1947), involved *documents and undisputed facts.*

In the instant case, the facts are neither stipulated to, nor are they depositions, nor does the case depend upon documents and certainly they are not undisputed. In our search we have found no similar case where it has been held that the Appellate Court need not give any weight to the findings of the trial court. The trial court in the instant case was called upon to read approximately 800 pages of reporter's transcript of testimony, which testimony was in sharp conflict in many particulars. Upon the basis of that study the court found that "there is medical opinion on both sides as to whether there are ill effects from taking said drug" [R. 158] and upon the record before it the Act was not violated by the defendants in these injunction cases. It would certainly seem (if the rule is that contended) as a matter of common sense that all of the time and expense utilized in the trial court was a mere waste of time; the study given by the trial court to the record and his findings and conclusions meant nothing and that this court is called upon to do what the trial judge did and review the entire record as though it were sitting as a trial court in the first instance. We do not believe that this court will be willing to announce that the rule in the cases cited by the Government applies in a case such as this.

The contention made by the Government that this proceeding must be heard *de novo* is clearly erroneous and apparently the Government has confused the rule in admiralty with what they contend the rule to be here. The rule in admiralty is that upon appeal the case is open for a trial *de novo* and even in such cases the findings of the

trial court, when based upon the depositions or documentary evidence alone, are entitled to some weight but not as great weight as when based upon conflicting oral testimony.

See:

Johnson v. Griffiths S. S. Co., 150 F. 2d 224-225 (9th Cir., 1945);

Matson Nav. Co. v. Pope & Talbot, Inc., 149 F. 2d 295, 298 (9th Cir., 1945).

The mere fact that the trial judge did not see any of the witnesses or hear them, does not mean that his findings are to be eliminated from consideration. Even in the case where the record depended upon depositions, it has been held that the findings cannot be disregarded and they will not be set aside unless clearly erroneous within the meaning of Rule 52(a), Federal Rules of Civil Procedure.

Heim v. Universal Pictures Co., Inc., et al., 154 F. 2d 480, 491 (2nd Cir., 1946).

A case quite in point is *U. S. v. Aluminum Co. of America,* 148 F. 2d 416, 433 (2nd Cir., 1945), where Judge Learned Hand pointed out that even where the trial court is to decide the case without hearing witnesses, his duty is to sift the evidence and put it in logical sequence and that it is "physically impossible for an appellate court to function at all without according some *prima facie* validity to his conclusions."

In the final analysis, Rule 52(a), Federal Rules of Civil Procedure, by the express terms thereof provides that "findings of fact shall not be set aside unless *clearly erroneous.*" Certainly in this case the evidence was in sharp conflict and in addition thereto two of the principal Government witnesses were impeached to the point that not

much credence could be given to their testimony. Under these circumstances it hardly could be said that the findings of the trial court were clearly or otherwise erroneous and not supported by a preponderance of the evidence.

B. THE ACT IS NOT SUSCEPTIBLE OF AN INTERPRETATION THAT THE ADMINISTRATOR IS EMPOWERED TO DETERMINE WHAT DRUGS MAY BE SOLD ONLY ON PRESCRIPTION, IN WHICH EVENT NO DIRECTIONS FOR USE OR WARNINGS CAN BE "ADEQUATE."

1. Preliminary Statement.

On page 71 of the Government brief it is said that with "slight modifications the regulations authorized by 21 U. S. C., 352(f) have been in effect for ten years and have been respected by all reputable drug manufacturers and distributors. Only those who operate on and beyond the fringe of the law have sought to find loop-holes in the statute authorizing these regulations." On the contrary, there has been a great deal of dissension among drug manufacturers regarding these regulations and the Food and Drug Administration is at the present time revising them, especially those relating to the prescription clause, and have submitted to drug manufacturers as of now two proposed regulations for their comments with the view of them becoming permanent shortly.

To get an idea of the view of "reputable drug manufacturers" we refer the court to the November 1950 issue of the Food, Drug and Cosmetic Law Journal, Volume 1, No. 9, page 746. On this page appears an article entitled "Prescription Refills" by Walton M. Wheeler, Jr., Secretary and General Counsel of Eli Lilly and Company, one of the oldest and probably best known pharmaceutical manufacturers in the world. Mr. Wheeler in his

article discusses the Durham-Humphrey Bill, which will be found on page 79 of the Appendix to this brief. Mr. Wheeler discusses the very attempt of the Food and Drug Administration which is being made in this case to decide for itself what drugs may be sold on prescription, what drugs must be sold on prescription and therefore cannot be labeled with adequate directions for use or warnings. The author stated that soon following the effective date of the Act, became of dissension on the part of retail pharmacists concerning the prescription legend placed upon drugs by the manufacturers, the regulations under Section 502(f) of the Act were revised "so as to restrict the use of the prescription legends which could not be safely or effectively used without medical supervision" [R. 751]. He then pointed out that "the primary responsibility for selecting such drugs was left with the manufacturers, *since the Act conferred no authority upon the Food and Drug Administration to create classes of drugs or to specify the manner in which drugs of each class should be labeled and sold*" [R. 751]. He then went on to state as follows:

> "But the implication and result of the regulations, when viewed in the light of the remaining subdivisions of Section 502, presented the problem of whether a drug which, in fact, is safe and efficacious only when used under medical supervision, may be labeled for over-the-counter sale without running afoul of Sections 502(a), 502(f) or 502(j). It appears that the view of the Food and Drug Administration is that the Act itself classifies drugs into counter items or prescription items on the basis of efficacy and safety following a factual determination on a case-by-case, product-by-product basis. If this be the proper interpretation of the Act (then obvious-

ly the law is basically a restrictive sales law; that is, it controls not only the manner in which a drug is labeled but the exact manner in which it must be sold. *Surely, if this be the proper interpretation of the Act, no one should be more surprised than Congress.* The battle for the enactment of the Act is portrayed in volumes of committee hearings, committee reports, and Congressional debates, and in countless early drafts of the Act. All of this material seems to support the conclusion that *Congress assumed and intended that a drug consumer would receive adequate protection if the label told him what he was taking, how to take it, and when to stop.* This is borne out by the oft-repeated quotation from the report of the Senate Committee on S. 5:

"'The bill is not intended to restrict in any way the availability of drugs for self-medication. On the contrary, it is intended to make self-medication safer and more effective. For this purpose provisions are included . . . requiring that labels bear adequate directions for use and warnings against probable misuse. . . .'

"Accordingly, there is little to support the view that anything in the Act or in its legislative history requires drugs to be divided into two classes, the one class for distribution over the counter directly to consumers and the other class for distribution on prescription only. Therefore the present regulation which, by implication if not directly, requires the use of the prescription legend on drugs that may be used safely and effectively only under medical supervision is of questionable validity." (Emphasis added.)

The proposed Durham-Humphrey Bill which is quoted in full in the Appendix seeks to give the Food and Drug Administration the very power which it now contends in

this case it already has. This bill is supported by the Food and Drug Administration and it would certainly appear that if the power already exists to decide what shall be sold on prescription and in no other manner, there would hardly be any need for such a bill.

Considering the language of Section 502(f) of the Act, 21 U. S. C., 352(f), the language in the proviso does not confer on the administrator the authority to decide which drugs may be sold upon prescription only but rather simply gives him the authority to exempt drugs from the requirement of adequate directions for use *when that requirement "is not necessary for the protection of the public health."* When it is necessary for the protection of the public health they shall be contained on the labeling, and when it is not necessary they may be exempted. This is a far cry, however, from an interpretation which would give the power contended for to the administrator. It is contended on page 43 of the Government brief that should this judgment be affirmed, then barbiturates, narcotics, etc., which have always been confined to prescription sales, could be sold without prescription. On the contrary, the Harrison Narcotic Act (26 U. S. C. A., Sec. 2554) requires the sale of narcotics on prescription. The sale of barbiturates is restricted to prescription in every state in the union. Penicillin and aureomycin can only be sold upon prescription for the reason that an amendment to the Food and Drug Act permitted the administrator to promulgate regulations certifying batches of these products before they might be sold and these regulations require prescriptions. In the final analysis there is no more danger as disclosed by the evidence in this case from the sale of these products labeled as they are labeled here, than there is in the sale of countless other products which are sold directly to the layman.

2. The Legislative History of the Act Is Convincing That Congress Intended Labeling of Drugs to Bear Adequate Directions for Use and Warnings and Not to Empower the Administrator to Determine That Some Drugs Could Not Be so Labeled.

As pointed out in Mr. Wheeler's article, if the interpretation of this Act be that contended for by Appellants "no one should be more surprised than Congress."

At the Senate hearings on the original bill, S. 1944, W. G. Campbell, Commissioner of Food and Drugs, stated that the section was "merely to require that directions for use be stated on drug labels * * *. *It makes compulsory the use of a label*" [App. 63]. It should be noted that the original section [App. 62] as well as the section contained in the successor bill, S. 2000, both contained exemption provisions similar to that contained in the present Act [App. 63].

S. 2800 provided that the warnings on the labeling should be those prescribed by regulations [App. 64]. No such similar provision is contained in the present Act. The report in the Senate on S. 2800 stated that the paragraph involved required directions for use *"but where it is not necessary"* it could be exempted from that requirement. Note that there is nothing so far which would indicate that the members of Congress thought for a moment that they were to vest in the administrator the power to restrict the *manner* in which drugs might be sold; only that the labeling bear adequate directions, except that where this was not necessary for the protection of the public health they might be exempt from so doing. The same report [App. 64-65] stated that the mere giving of directions might not avert tragedy from likely misuse

"unless accompanied by positive warnings." This is a fact and of course is true with numerous other drugs. Senator Copeland, the author of the bill, stated that it "provides an effective safeguard against these dangers"—dangers arising from lack of adequate warnings though the directions for use may be adequate [App. 65-66]. Mr. Campbell, in commenting upon this bill, attempted to allay criticism by pointing out that with the requirement of adequate directions for use and warnings, the public would be amply protected [App. 66] and, as Senator Copeland stated, in presenting that bill, it was not in any sense intended to do what certain objectors said about it: "You can't take an aspirin tablet without a doctor's prescription." As to that he said, *"Nothing could be further from the truth"* [App. 66-67].

With reference to the succeeding bill, S. 5, the report in the Senate emphasized "there are no useful products which would be barred from the market under this provision since labeling, *with proper directions for use,* would remove any worthwhile articles from this ban." It also stated that this provision was not intended to "ban the sale of useful drugs *when they are appropriately labeled"* [App. 67-68].

It would be presumed that if the committee had thought certain essential drugs might be characterized as so unsafe that proper labeling could not be devised for them, at that point it would have said so but instead it said the contrary.

It may be properly assumed that the requirement of Section 502(f)(2) of the Act (21 U. S. C. 352(f)(2)) requiring warnings against possible misuse, was regarded by Congress and the committee as sufficient protection of

consumers against misuse of the class of drugs which the Food and Drug Administration contends must, under regulation (Section 1.106) bear the prescription legend. There are repeated statements and committee reports and by sponsors of the several bills that the purpose of the section was to guard against misuse of "potent drugs" [See references, App. p. 68].

As pointed out on page 69 of the Appendix, some of the earlier bills leading to the enactment of the present Act provided that advertisements for certain named diseases "wherein self medication may be especially dangerous" should be deemed false except when disseminated to the medical profession. Note that there is no comparable provision in the existing Act. In other words, Congress rejected it and Senator Copeland stated in response to criticisms that under the Act a person would no longer be permitted to buy any "favorite prescription" and take it under the direction of the labeling, "Of course, that was not the intent of the proposed law" [App. 69].

Succeeding bills [App. 69-73] provided that labeling would be false unless it bore warnings as were required by regulation against use in certain conditions. These proposals, however, were rejected from the bill as finally enacted.

In the report in the House of S. 5 [App. 76], the same theme is carried on, that the bill was not intended in any way to restrict the availability of drugs for self medication but were intended to make it safer and more effective.

With regard to the warnings necessary, Senator Lea, one of the principal proponents of the bill, stated that a change had been agreed upon to require that warnings be "adequate" instead of those prescribed by regulation; but that the Secretary (the Administrator) can prescribe exemptions on the grounds of impracticability. It is evident here that there was no thought in the minds of the members of Congress that the Administrator was to do other than exempt drugs from the requirement of adequacy of warnings and directions when it was not necessary for the protection of the public health but that certainly he was not being vested with the power to decide what drugs could not bear adequate directions for use or warnings because in his opinion they should only be sold on prescription [App. 77]. Mr. Campbell's statements at the Senate hearings were to the same effect, that the labeling was intended to advise the consumer, and not one word was mentioned about the power now contended for being the intent of the Act [App. 78].

We do not believe that more need be said. We believe it plain from the legislative history that the intent was never entertained in Congress that the administrator should have the power now contended for by him. Instead of there being anything to indicate the grant of such power, all of the history is directly to the contrary and it is our firm conviction that in order for the contention of the Government to prevail it will be necessary to actually insert by judicial construction language into the section which cannot possibly be found there by any reasonable interpretation.

C. THE FINDINGS ARE FULLY SUPPORTED BY A PREPONDERANCE OF THE EVIDENCE.

1. Preliminary Statement.

The statements of Judge Westover at the time of announcing his decision are found in the record [pp. 960-965]. Among other things he stated that there was medical opinion on both sides as to whether taking this drug caused any ill effects but that the question rather was not what the effect of taking the drug was but what was on the packages [R. 963] and that he was doubtful under the circumstances whether any sort of labeling would meet the objections of the Food and Drug Administration; that in view of the admonition in four different places on the labeling to consult a doctor, "I don't know what more words would be put upon their cartons that would be a greater warning" [R. 965].

It should be kept in mind that the substance of the affidavits of Mr. Parkinson and Mr. Clemens are undenied by any counter-affidavits. In fact there is only one affidavit filed in response to Parkinson's affidavit and that is full of conclusions for the most part. The affidavits filed in response to the Clemens affidavit [R. 20, 120, 136] all go to the point that the revised labeling was not done in good faith and that persons who buy the product do not read the label.

The supplemental affidavit of Mr. Roe [R. 136] concerning interviews with persons who had purchased this product and that they did not read the labeling is of the rankest type of hearsay and wholly immaterial. If the right of a manufacturer to sell a product depended upon whether the individual to whom it was sold read the label, it could then be argued that any product was misbranded

in violation of the Act. Furthermore, carried to a further extreme, it might be questioned whether persons who obtained prescriptions read the instructions on the label and particularly might this be true where the prescription label simply states "take as directed."

In studying Appellant's brief, we find them stating in one breath that the labeling involved here is insufficient because it does not state all of the conditions of use and the warning statements are insufficient because technical words are employed, when in another breath they argue that *no* directions for use or no warnings can be adequate. It appears to us that this argument can simply mean that the Government is unsure of their position and are attempting to convince this court (1) that the directions and warnings are inadequate; (2) if the court should hold that the directions and warnings are adequate that nevertheless the product should not be sold except upon prescription. Obviously both of these contentions cannot prevail, for if the directions and warnings are adequate the statute is complied with and whether the Government is of the opinion that it should be sold upon prescription would be beside the point.

In Mr. Parkinson's affidavit [App. 47], he refers to an exchange of correspondence between Robert S. Roe, Chief of the Los Angeles District of the Food and Drug Administration and the Southern California Pharmaceutical Association, Ltd. In our opinion the letter from Mr. Roe is the antithesis of "clean hands," particularly when one considers that nothing was mentioned in his letter that the very question was before the court and knowing as he must have known that his letter to that organization would dissuade its members from purchasing this product. The Government is as much bound by the doctrine of

"clean hands" when seeking equitable relief as a private litigant. (*U. S. v. Belt,* 47 Fed. Supp. 239, 241 (1942) and cases cited therein.)

Throughout the Government's brief the tone is sounded (1) that the revision of the labeling following the criminal cases was not in good faith; (2) the assumption is made that the evidence established the contrary of that which the trial court found; (3) as though these consolidated cases were in fact the criminal cases which preceded them and which involved entirely different labeling; (4) that we acknowledge the danger of this drug and have attempted to do mere lip service to the requirements of the Act. At this point let us say that this revised labeling was composed following the criminal cases in an effort to comply with the theory and the evidence of the Government in the criminal cases. This was done without any admission on the part of the defendants that they agreed with the evidence of the Government witnesses. The revision was made, however, in good faith in an effort to avoid any further difficulties with the Food and Drug Administration.

The theories in the criminal cases and in these injunction cases were entirely different and so was the labeling The trial court here was called upon to consider the evidence which had been introduced in the criminal cases, together with the additional record by way of affidavits as though that evidence were being introduced for the first time. No contention was made in the criminal cases that the Act provided that these products may only be sold on prescription, only that the labeling represented the product to be useful for many purposes for which it was not useful and that the labeling in the *Clemens* case should have had a warning statement and it did not. It should

be remembered that in the *Parkinson* case there was a warning statement and no charge was made that it was not sufficient. Several statements are made in the Government brief to the effect that these defendants are in the practice of promoting these drugs indiscriminately and for conditions for which they are useless, is a gratuitous statement for which no support in the record can be found.

In the footnote on page 30 of their brief, the Government quoted an editorial appearing in the Pacific Drug Review for the purpose of showing the alleged concern of others in the decision of the trial. This is a statement that is wholly improper and in direct violation of the rules to this court.[1]

Throughout its brief, Appellant attempts to stress the so-called "dire consequences" that will result from the judgment in these cases because it is claimed that this drug is of such a character that no directions for use can be adequate. This of course flies in the face of the findings

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[1]In view of this quotation which we consider to be improper, we feel it only right that we should call to the attention of the court an article appearing on page 4, Part I of the Los Angeles Times of the issue of Friday, December 1, 1950. This article, written by one of the scientific editors of the Los Angeles Times, describes a meeting at the annual convention of urologists in Los Angeles. The conclusions of Dr. Robert L. Bacon of Stanford University were interpreted by Dr. A. J. Scholl, a member of the convention's Board of Governors. It was stated in the press article as follows: "Hundreds of men, it was brought out in the discussion which followed Dr. Bacon's talk, have feared to take the male hormone, testosterone, because of the fear that cancer of the prostate might develop. *There is not a single case in medical literature, it was revealed, in which the administration of testosterone brought on cancer.*" It was also stated in this article that "the strange new findings reported at the meeting is that *a few of the most advanced and virtually 'hopeless' cases of prostate cancer have responded amazingly, not to the female hormone but to testosterone, the male hormone. A few of these desperate cases actually recovered.*" (Emphasis added.)

of the trial court decided upon conflicting evidence. In support of those findings the following must be kept in mind:

1. To begin with there is nothing in the Act that gives the Food and Drug Administration the power to classify drugs into those for which directions for use can be written and those for which they cannot;

2. By reason of the conflicting character of the evidence and the impeachment of two of the principal Government witnesses, the trial court could and did find that nevertheless the directions for use were adequate.

In so doing, regardless of whether the Act gives the Food and Drug Administration the power to classify drugs, the court found that under the evidence the drug was not of such a character that the directions for use were not and could not be adequate because:

(a) The Government and defense experts were in disagreement on the existence of a male climacteric and much of the scientific literature was in disagreement with the Government witnesses on the subject.

(b) Likewise the Government and defense witnesses were in disagrement on the effect of the drug on fertility and likewise scientific writings were in disagreement with Government witnesses.

(c) The Government witnesses themselves recognized a conflict to exist between their opinion and that of others.

(d) Two Government witnesses, Dr. Belt and Dr. Heckel, were shown not to administer the elaborate tests which they testified were an absolute prerequisite to the administration of the drug.

(e) The associate of Dr. Belt—Dr. LeTourneau —gave a prescription for the drug without ever having seen the man for whom it was prescribed, let alone making any tests.

(f) A man 70 years of age (supposed to be the dangerous age so far as this drug is concerned) called at random on 15 general practitioners in the metropolitan area of Los Angeles, asked for a prescription of the drug and obtained it in each case without any of these doctors laying a hand upon him. Likewise many other general practitioners would do the same thing and likewise would testify in accordance with the testimony of the defense withnesses that such tests were not given, that the product was not dangerous, that the male climacteric was widespread and the drug was given for the relief of the symptoms thereof.

(g) The Government witnesses themselves were not uniform in their testimony as to the tests necessary to determine a hormone deficiency.

(h) The Government witnesses were professional and scientific investigators and experimenters and the methods employed by them in arriving at a conclusion were vastly different from those employed by the general practitioner who is the one to whom the individual goes for treatment or, as Dr. Belt put it, he is the "meat" for the general practitioner.

(i) That an individual would not receive the tests mentioned by the Government witnesses and therefore a label such as this one advising, among other things, to see a doctor, was more informative than if he obtained a prescription from a doctor who

gave no tests and on whose prescription the only directions were "take as directed" and with no warnings of any kind.

(j) That in the criminal case against Parkinson a warning statement was contained on his labeling which was apparently deemed sufficient as no charge was made in that case as to him that it was inadequate, or that no warning statement could be adequate.

(k) With respect to the charge that the 5 milligram dose has no therapeutic value, the United States Pharmacopoeia, the National Formulary, and New and non-Official Remedies, all standard medical publications suggest 5 milligrams as the dosage, and furthermore that Dr. Heckel, the Government witness, prescribed that dosage for Hazen Parkinson.

(l) That in the criminal actions certain counts involved 5 milligram products and no charge was made in either of those actions that 5 milligrams had no therapeutic value; that the old patent medicines, Dr. Pearce's Favorite Prescription, Dr. Pearce's Golden Medical Discovery, Dr. Miles Nervine, and Lydia E. Pinkham's Vegetable Compound, have been sold for many years with labeling which is subject to the same contentions raised by the Government herein and the fact that they have been and are sold under such labeling constitutes an administrative interpretation (See 42 Am. Jur., "Public Administrative Law", Sec. 78 *et seq.*) that the directions for use and warning statements on the labeling herein are adequate.

(m) That the labeling involved in *U. S. v. Hassenstein* [see R. 49], so far as directions for use and warnings are concerned is similar in many respects

to the labeling involved herein and that the District Court in the *Hassenstein* case found the label to bear adequate directions for use and warnings.

We have set forth in the Appendix to this brief, a narrative statement of the facts which we believe necessary to be reviewed in deciding whether those facts support the findings and conclusions of the trial court.

Finally, we are confronted with the astounding statement found on page 46 of Appellant's brief in which they state that this action "is a sort of *legal squeeze play* by the Government by which the Government hopes to eliminate worthless panaceas and dangerous drugs from indiscriminate distribution in the channels of commerce." This, in our opinion, constitutes an admission that nothing is to be found in the Act which supports the Government's theory that they are using a "squeeze play"—attempting to warp the interpretation of the Act to enable them to decide what drugs may and what may not be sold on prescription. If a "squeeze play" is valid here, then what is to prevent the Food and Drug Administration from at any time deciding that a certain drug shall be sold upon prescription only and instituting the remedies provided under the Act upon the theory of misbranding? How is a person to know in advance under such circumstances whether the product they are selling is one which the Food and Drug Administration has suddenly decided is dangerous and may only be sold on prescription? We seriously question the constitutionality of the Act under such an interpretation.

2. The Labeling Bears "Adequate Directions" for Use Within the Meaning of 21 U. S. C. 352(f)(1).

We point out, to begin with, that the evidence of the Government on this phase of the case as contained in the transcript of testimony was on this point alone,—that methyl testosterone would be efficacious in the treatment of sweats, flushes, inability to concentrate on activities, etc., provided that they arose as a result of a male hormone deficiency but that no one but a doctor would be competent to determine that fact.

It is inconceivable how the directions for use could be more adequate than those contained on the label here, keeping in mind the testimony of the Government witnesses introduced in the criminal cases and found in the record here and the revisions made in precise conformance thereto. First, the individual is advised that the product is to be used by males deficient in male hormone when small dosages *are prescribed or recommended by a physician for the palliative relief of the symptoms of a hormone deficiency.* In order to eliminate any doubt on the subject, however, the label adds that it is impossible for an individual to determine whether he has a hormone deficiency and that therefore "*before taking testosterone a physician should be consulted*" as it will not aid or relieve symptoms not associated with a deficiency.

It is claimed that the labeling fails to state all of the conditions for which the product is prescribed, recommended or suggested in the labeling. It must be assumed that a proposed user of the product will heed advices such as mentioned. If they do, then the physician determines whether they are in need of it. If they do not, certainly the maunfacturer or distributor cannot be charged with

mislabeling any more than could a manufacturer of iodine be charged with it if the user failed to heed the warning that it was poison, took it internally, was made violently ill, or died. As pointed out by Judge Westover, carried to the extreme which the Government would have it, no label for any drug, much less this one, could possibly be large enough to state all of the conditions which might be found in the medical textbooks *if* the Food and Drug Administration happen to decide that they do not want a particular drug sold except upon prescription and that therefore no directions could be adequate.

The Government claims that the suggested dosage contained on the label is intended to tell the user how to use the product without ever seeing a physician. This suggestion on the label is merely a suggestion which is found time and again on drugs sold directly to doctors. It is probably not necessary because it may be assumed, when the person has seen the doctor, that the latter has advised him how much to take. We know as a practical matter, however, that frequently the individual forgets the advice given by the doctor and more often than not the label on the prescription will say "take only as directed." Therefore in the event that the individual has forgotten or the doctor has failed to advise him how much to take, this suggestion is given to him and no contention is made that it is incorrect. After all, it is merely a "suggestion", not to be followed if the doctor directs otherwise. Under the heading "suggested dosage" the individual is further cautioned that merely because the doctor has recommended the product, he should not keep on using it for an unlimited period of time and in fact should not use it as long as three months unless he does so under the supervision of a physician.

Throughout the Government's brief the claim is made that the defendants simply do "lip service" in compliance with the Act. Hardly can such a contention validly be made after the critical review of the evidence given by Judge Westover and his conclusion that the Act was not violated. On the subject of the labeling bearing a statement of all of the conditions and diseases for which the drug is contended, let us consider a small practical example aside from anything else. If this contention were true, it would mean that a drug, for example, a laxative sold as a laxative for constipation, would have to carry on the label adequate directions for every symptom of constipation that might exist. For instance, constipation can cause a temporary dull headache, bloating, abdominal discomfort, dullness, lack of energy, and these symptoms might be enumerated *ad infinitum.* To list all of those symptoms on the label would not only be wholly impracticable but would present an impossible labeling problem.

Alberty Food Products Co. v. U. S. (9th Circuit, November 20, 1950, No. 12,483) is cited on page 41 of the Government brief. This case is no authority at all for the reason that the label there failed to indicate any purpose whatever for the use of the product.

In conclusion under this point, we submit, as found by Judge Westover, that if the requirement that adequate directions for use appear on the labeling means anything at all, it certainly has been complied with on this labeling.

3. The Labeling Bears "Adequate Warnings" Within the Meaning of 21 U. S. C. 352 (f) (2).

The claim is made here in one breath that the warning language on the labeling is couched in technical terminology which the layman cannot understand. In another breath it is stated that no warnings can be adequate and therefore the product may only be sold on prescription. One of these principles must be true, not both.

We again remind the court that in the *Parkinson* criminal case a warning statement was contained on the labeling which must have been deemed sufficient for no charge was made there that the language was inadequate. Mr. Parkinson revised his labeling so as to conform to the evidence introduced by the Government in the criminal cases, not, however, in the belief that they were correct in their position and certainly he was fortified in this belief by the impeachment evidence of Drs. Belt and Heckel.

On page 34 of the Government brief it is stated that a temporary restraining order was not sought against Parkinson because he was selling a product of a lower potency —5 and 10 milligrams. We wonder if by this the Government means that this potency would not cause cancer as much or as quickly as a higher potency. If so, where is the dividing line? There is certainly no evidence in the record to support such a contention.

On page 24 of the Government's brief it is argued that the product is not saved from being "dangerous to health" by reason of the suggestion in the labeling that a physician be consulted prior to its use. However, the Food and Drug Administration, in their published list of accepted

warnings for over-the-counter products, suggests the following warning for atropine:

> "WARNING: This preparation should not be taken by elderly people except on competent advice."

The reason is that an elderly person taking atropine can be seriously injured. Therefore atropine is a dangerous drug but the Food and Drug Administration must feel that it is safe from being dangerous by a suggestion such as stated. In fact the same is true with most drugs; if taken under certain circumstances they may cause serious illness or death. Aspirin can have serious effects if taken in excessive quantities. Bromides the same. Yet we find Bromo Seltzer sold at nearly every soda fountain. Dr. Thienes, a Government witness, stated that people go to mental hospitals from over-doses of bromides and that an excess of bromides can cause mental derangement [R. 382-383]; also that people taking an excess of Alka Seltzer will, in the long run, find themselves suffering from alkalosis; and that is sold over the counter [R. 383].

Mr. Roe of the Food and Drug Administration filed an affidavit [R. 136] alleging investigations made by his office to determine whether people who bought these products paid any attention to the labeling and regardless of the admissibility of the affidavit the effect was that a majority did not. If this product causes all of the harm that the Government would have this court believe, it certainly would seem that they would have produced an affidavit from someone who had been harmed by the taking of it but not one was offered, nor, as a matter of fact, was any offered to show that people who had taken the product had failed to obtain the results advertised for them.

Why is it that the Government assumes, in this case, that the individual is unable to heed the warning state-

ment? In other cases the Government presumes the layman capable of at least finding out whether he has the condition warned against. For instance, the accepted warnings for bromides is that they shall "not be taken by those suffering from kidney diseases." This warning doesn't even suggest that the layman go to a physician and find out whether he has such a disease.

On page 34 of the Government brief it is said that the revised labeling involved here acknowledges the restricted usefulness of the drug as well as their dangers. As we have said, this labeling was devised to meet the objections made by the Government during the course of the criminal cases. Certainly there is nothing wrong with labeling that does just that, for the same is true with many other drugs sold over the counter. We have already mentioned bromides. Acetanilide is sold with a warning statement that frequent or continued use may be dangerous, causing serious blood disturbances, anæmia, etc. In view of all of that, what is there in the evidence to require the court to find that the warning statement on the labeling here is not and cannot be adequate?

On page 49 of the Government brief it is stated that "With an established clientele and a crystallized concept in the public mind," it is not necessary for the defendants "to be as outspoken as heretofore in hawking their wares." If this drug is all that it is claimed to be, dangerous to health and of no value, there could hardly be an established clientele for they would either have all died or stopped using the product one way or the other, maybe both.

When we consider what this labeling advises and what the Food and Drug Administration permits in other cases of a comparable character, we begin to understand the

significance of the "squeeze play" mentioned on page 46 of the Government brief. That play is nothing more or less than an attempt to "squeeze" these defendants out of business simply because the Food and Drug Administration has concluded, without any statutory authority, that the product should be sold only on prescription notwithstanding the conflicting evidence and the conclusive impeachment of Drs. Belt and Heckel and the findings and conclusions of the trial court based upon that evidence.

With regard to the so-called technical terminology employed in the warning statement, the same type of terminology was employed in the *Hassenstein* case [R. 49] and held to be sufficient and the same objections were made in that case as made here.

Note particularly that the term "carcinoma" was the language employed in the informations in the criminal cases. It must be assumed that in using that language the Government intended to comply with Rule 7(c), Rules of Criminal Procedure, and considered that term to be a "plain, concise and definite" statement of fact constituting an element of the offense charged. Here again the Government says in one breath that the warning statement is inadequate because of technical language used and in another breath states that no warning language can be adequate. Paraphrasing the language of the court in the *Hassenstein* case, the terms "carcinoma" and "spermatogenesis" are dictionary words which are clearly understood to mean, respectively, cancer and the ability to produce offspring.

In view of the contention made that this product is inherently dangerous and should only be sold on prescription, it follows that contention presupposes that if a person should call on a doctor he will conduct elaborate tests to determine whether there could be any potential danger in

taking the product. However, we have the testimony of Hazen Parkinson who called on 15 different doctors in general practice in Los Angeles and Long Beach and obtained a prescription without any of them laying a hand on him. That reflects the attitude of the general practitioner who, Dr. Belt admits, was the one to whom an individual would go—was his "meat." It certainly may be assumed that if such was the case, with 15 doctors picked at random, the same would be true with the vast majority; the same as in sampling a product containing many packages, one may assume that several samples picked at random from the container are demonstrative of the condition of the whole. Therefore a prescription under these circumstances would mean far less than the informative labeling which is before this court.

4. The Drug Is Not Dangerous to Health Within the Meaning of Section 21 U. S. C. 352(j).

What we have heretofore said under subheading 3 is applicable here as well, that is, that the drug is not dangerous to health when used in the dosage and with the frequency or duration prescribed, recommended and suggested in the labeling and that was what Judge Westover found to be the case on the record before him.

5. The Labeling Is Not False and Misleading Within the Meaning of 21 U. S. C. 352(a).

The charge is made that the 5 milligram dosage is therapeutically worthless and therefore the labeling of such a product is false or misleading.

It is conceded by the official United States Pharmacopoeia and other authorities that the sublingual dose of

5 milligrams is equivalent to the oral dose by mouth of 10 milligrams. Dr. Huggins testified that a male hormone deficiency in his institution is treated by 10 milligrams by mouth [R. 546] which, as we say, is the equivalent of 5 milligrams sublingually, which in turn is the dosage involved here. On the other hand, we have Dr. Belt, a Government witness, stating that 5 milligrams sublingually is worthless [R. 17]. When confronted with the recommended dosage found in the United States Pharmacopoeia and the National Formulary, the Government contends that the United States Pharmacopoeia may be out of step. If this sort of an argument is worth anything, then these two nationally accepted publications might as well be forgotten and reliance upon them in the Act eliminated. Nevertheless the new United States Pharmacopoeia has appeared since all of the testimony in this case. The 14th edition became effective November 1, 1950, and on pages 366-368 the dosage for methyl testosterone is given and reads as follows:

> "Usual dosage of methyl testosterone, 10 milligrams, sublingual 5 milligrams."

Also, as pointed out, Dr. Heckel, the Government witness, wrote a prescription for 5 milligrams for Mr. Hazen Parkinson [R. 901].

Also in the criminal information 5 milligram tablets were involved and no charge was made that they were therapeutically worthless.

V.

CONCLUSION.

Much of what is said in the Government's brief is matter entirely extraneous to the record. The fact remains that these products were relabeled so as to conform precisely to the contentions made and the theory advanced by the Government in the criminal cases. It is sought here for the first time to interpret Section 502(f) (21 U. S. C. 352(f)), in a manner never done before and which power is sought to be given the Food and Drug Administration by the Durham-Humphrey Bill. The power now claimed, we earnestly contend, is not given to the administration by any reasonable interpretation of the Food and Drug Act. The trial court found upon conflicting and convincing evidence that there was a conflict of opinion as to the danger contended for and that the directions for use and warnings were adequate. We submit that these findings under the evidence are far from being "clearly erroneous" within the meaning of Rule 52(a) of the Rules of Civil Procedure, but are simply supported by a preponderance of the evidence and that the judgments must therefore be affirmed.

Respectfully submitted,

EUGENE M. ELSON,
Attorney for Appellees.

APPENDIX.

I.

THE PLEADINGS IN CASE NO. 10266-HW (THE EL-O-PATHIC OR CLEMENS CASE).

1. THE COMPLAINT AND AMENDMENT TO COMPLAINT.

The complaint alleged that the defendants distributed methyl testosterone tablets 10 mgs. and 25 mgs., and in linquet form 5 and 10 mgs. and various preparations of female hormone drugs [R. 3]; that they were purchased from three different companies and as received from the manufacturers the label bore the legend "Caution: To be dispensed only by or on the prescription of a physician." [R. 3]; that in the sale of these drugs a physician's prescription was not required by defendants but that they repackaged and relabeled them for sale without a prescription. For example, the linguets were labelled as follows [R. 4-5]:

"El-O-Pathic Hormones
50 Tablets
Each Tablet Contains
10 Mg. Methyl Testosterone

"Suggested Dosage: One Tablet upon arising before breakfast or one tablet shortly before retiring. Tablets should be held between gum and cheek, or under tongue, and allowed to dissolve slowly, so that hormone is absorbed by mouth tissues (saliva may be swallowed while tablet is in mouth, but do not swallow tablet). The maintenance dosage can be extended from three to six months, under supervision of a physician.

"Directions: For use by adult males deficient in male hormone (3) when small dosages of male hormone are prescribed or recommended by a physician for palliative relief of such symptoms.

Distributed by El-O-Pathic Pharmacy
1109½ No. Western Ave. Hollywood 27, Calif.
Hollywood 9-1722
(Read Side Panels)
(Side Panels)

"Caution: The male hormone should not be taken by anyone with carcinoma of the prostate or urinary retention probably due to carcinoma of the prostate or by anyone with cardiovascular disease, defects of spermatogenesis, sterility whether absolute or partial, or debilitation due to disease. Caution should be exercised when taking hormones for long periods since they have been reported as inhibiting spermatogenesis. Take only as directed.

"It is impossible for a layman to determine whether he has a male hormone deficiency, as similar symptoms may be caused by other conditions. Therefore, before taking testosterone a physician should be consulted, since testosterone will not aid or relieve symptoms not associated with male hormone deficiency. Children and young adults must not use except under constant direct supervision of a physician."

That in displays and newspaper advertising defendants suggested said drugs to be efficacious in alleviating disease conditions, particularly those relating to sexual impotence in men and change of life in women [R. 5]; that defendants violated Section 301(k) of the Act (21 U. S. C. 331(k)) in that the printed matter constituting labeling fails to bear adequate directions for use in failing to state all of the diseases or conditions for which the drug is in-

tended and that they violate Section 502(f)(2) of the Act (21 U. S. C. 352(f)(2)) because the labeling fails to bear adequate warnings against use in pathological conditions where its use may be dangerous to health in such manner and form as are necessary for the protection of the user, as the medical terminology constituting the cautionary statement is not adequate to warn the ordinary user that its use may accelerate a growth of cancer of the prostate or cause sterility; also that Section 502(j) of the Act is violated (21 U. S. C. 352(j)) in that the linguets are dangerous to health when used in the dosage and with the frequency prescribed as the drug may result in sterility and may accelerate the growth of cancer of the prostate [R. 5-6]. It was also alleged that Section 301(a) of the Act (21 U. S. C. 331(a)) is violated in the shipment of 10 mg. linguets misbranded in the same particulars [R. 6].

With respect to the 5 mg. linguets labeled as aforesaid, it was alleged that Section 301(k) of the Act (21 U. S. C. 331(k)) was violated because one tablet daily would be ineffective for the treatment of a male hormone deficiency, that the labeling failed to bear adequate directions for use and adequate warnings in the particulars as mentioned [R. 7-8]; that Section 301(a) of the Act (21 U. S. C. 331(a)), was violated because the 5 mg. linguets were misbranded in particulars aforementioned. It was alleged with respect to the tablets that "it is likely that the defendants will cause the same violations" of Sections 301(a) and (k) of the Act as they are causing with respect to the linguets as the defendants have in the past sold the products frequently without a physician's prescription and without adequate warnings [R. 8]. The conviction in the criminal action No. 20596—Criminal, on July 13, 1949,

was alleged and that within a month after the convictions the defendants embarked upon a wide spread promotion of the same products in essentially the same misbranded condition and that the revision of the labeling is a subterfuge by which the defendants hope to deceive the court and defraud the public [R. 9].

A temporary restraining order was applied for and an injunction to restrain defendants from in substance introducing into interstate commerce the drugs mentioned, in a misbranded condition [R. 10-11].

2. THE ANSWER.

The answer of the defendants in this case, in substance denied all of the material allegations of the Complaint. There was attached to the Answer as Exhibit "A," the labeling employed [R. 35-44].

II.

THE PLEADINGS IN CASE NO 10391-HW (THE HUDSON PRODUCTS CO. OR PARKINSON CASE).

1. THE COMPLAINT.

The complaint in this action was essentially the same as in action No. 1266-HW [R. 162-174], except the product involved was 5 mg. and 10 mg. However, no temporary restraining order was applied for.

2. THE ANSWER.

The answer in this case in substance denied the allegations of the complaint [R. 179-186] and specifically denied any intention to sell the female hormone drugs referred to in the complaint or that any had been sold by them since July 13, 1949, the date of the conviction in the criminal action.

III.
EXCERPTS FROM THE EVIDENCE.

The evidence in these consolidated injunction cases, by stipulation consisted of the pleadings and affidavits and the transcript of proceedings in the consolidated criminal cases *United States v. El-O-Pathic Pharmacy, et al.,* No. 20,596—Criminal, and *United States v. Parkinson,* No. 20,642—Criminal [R. 150; 269].

Any reference to the female hormone will be eliminated herefrom for the reason that it was never an issue in the trial court [R. 156, 272].

1. EVIDENCE OFFERED IN SUPPORT OF THE COMPLAINTS.

(a) Affidavits of Doctors Thienes and Belt.

Drs. Thienes and Belt filed affidavits in support of the application for a temporary restraining order and preliminary injunction in action No. 10266-HW, in which they each represented in part what was testified to by them previously in the criminal actions which testimony is part of the record here. In addition, however, they stated that these drugs should not be sold except upon prescription [R. 12-17].

(b) Affidavit of Robert S. Roe.

Robert S. Roe, Chief of the Los Angeles District of the Food and Drug Administration executed an affidavit in support of the application for temporary restraining order and preliminary injunction in case No. 10266-HW, to which was attached a letter introduced in the criminal

action and dated July, 1947. This letter was from Roche-Organon, Inc., and according to the affidavit was sent to defendant in that action and other distributors. The affidavit concludes that it "indicates defendants were warned two years ago as to the dangers inherent in the indiscriminate sale of these drugs to the public without a physician's prescription" and that defendants are now unloading a large quantity of these drugs without prescription upon the public [R. 20-22].

Under the stipulation as to the record in action No. 10266-HW [R. 150], the supplemental affidavit of Robert S. Roe, concerning the investigations made by his office as to whether purchasers of the product consulted physicians before using it [Appendix, p. 58; R. 136]; the affidavit of Wells [Appendix, p. 58; R. 131-136]; the affidavit of McRae [Appendix, p. 59; R. 107-118], and the transcript of the evidence, including exhibits, in the criminal cases, were made part of the record in this injunction action, subject to any objections as to relevancy and materiality.

In the action against Hudson Products Company, No. 10391-HW, the aforesaid supplemental affidavit of Roe, the affidavit of McRae, and the transcript of the evidence, including exhibits in the criminal cases, were made part of the record subject to objections as to relevancy and materiality. However, it was further stipulated in this action that none of the evidence in the transcript of testimony pertaining to the alleged danger of using testosterone under certain circumstances, was introduced as against

Allen H. Parkinson, defendant in No. 20642—criminal, and there was no charge by the government in that action that the warning statement on the labeling which related to the product sold by him was inadequate [R. 266].

As will be pointed out in the affidavits of Clemens [R. 49] and Parkinson [R. 53; pp. 42 and 47 of this appendix] following the judgments of conviction in the criminal cases they completely revised the labeling to conform to the objections made by the Government in those cases as reflected by the testimony of Government witnesses, even though their medical witnesses disagreed therewith. That labeling as revised presents the questions that were before the trial court in this litigation and before this court on this appeal, namely, whether the labeling involved *here* contains adequate directions for use and adequate warnings.

Suffice it to say that all of the witnesses for the Government in the criminal cases testified substantially that the male hormone was of great benefit to persons suffering from a male hormone deficiency, but that an individual was incapable of diagnosing that condition and that there was danger in taking the product without consulting a physician first in that it may accelerate the growth of a carcinoma of the prostate and might cause partial loss of fertility.

The Appellant's brief, pages 2 to 8, sets forth the references to the transcript of testimony in the criminal cases in which the opinions of these witnesses on those subjects appear.

(c) Testimony of Dr. Clinton A. Thienes.

On the basis of his education and experience he thinks he knows the consensus of medical opinion regarding the toxic effects which methyl testosterone may have upon the adult male [R. 353]. That consensus is that such product may produce a condition which would result in a deficiency in the ability to reproduce. His opinion is the same as the consensus [R. 354-355]. Assuming a man to be suffering from flushes, sweats; is extremely nervous, unable to concentrate and is suffering from nocturia, and he called on an average general practitioner, other things being equal he cannot say that such a practitioner would, under the circumstances, prescribe testosterones for a period of time and wait to see whether the symptoms were relieved as he the witness would have to know of what the practitioner's examination had consisted and what the urologist may have done in the way of examination [R. 365]. Even if the urologist's report was that he had palpated the prostate and performed a biopsy and there was no evidence of cancer of the prostate and no enlargement; that laboratory tests were conducted with nothing to indicate any presence of such a cancer, that would not be adequate to determine whether testosterone should be administered for those symptoms as there would have to be proof that there was a marked decrease in the secretion of testosterone [R. 365-366]. Whether such a complete examination is made in every case that an individual is sent to a urologist under such circumstances would depend on what the urologist was asked, but he thinks that most competent urologists would

return the patient with advice to the general physician and before arriving at a conclusion as to what advice he would give he would certainly determine whether there was evidence of a male climacteric and that would involve determination of the secretion of male hormone [R. 366] and so it would only be then if a man was actually suffering from a deficiency of the male hormone as determined by the amount of secretion of the male hormone and after a urologist diagnosed that no cancer of the prostate was present and the laboratory tests referred to have been taken not indicating the presence of such a cancer that he thinks the doctor would give testosterone [R. 366-367]. He thinks today that the general practitioner would want to know for sure whether the man was suffering from a case of climacteric before giving testosterone even after receiving a report from the urologist there there was no presence of cancer of the prostate [R. 367]. There is no such thing as the average general practitioner [R. 367]. He thinks that the majority of general practitioners would require a laboratory test prior to prescribing it and that thought is based upon his knowledge of medical literature. Testosterone has been responsible for prostate cancer growing rapidly but he would not say that it caused a cancer to develop or actually start [R. 368]. He doesn't remember any specific instance at the moment where such a fact has been proved clinically [R. 369]. He cannot state what literature he had reference to that led him to interpret the literature to indicate that testosterone will accelerate the growth of cancer of the prostate [R. 369].

The only way to determine whether a person is suffering from a hormone deficiency is to make laboratory tests [R. 386]. These tests consist of sampling the urine [R. 392].

(d) Testimony of Dr. Warren Nelson.

His studies have been conducted at the University and have concerned humans as well as experimental animals. In the case of humans the procedure is to obtain a sample or biopsy of both testes prior to treatment, administer the hormone for a period of time, at the end of which a second biopsy would be obtained and compared with the first [R. 396-397]. His studies have shown to him that the administration of testosterone decreases the activity of the testes in the production of spermatozoa and in the production of testosterone in the testes. This decrease would last for the duration of the treatment. How much beyond that it is difficult to say [R. 396-398]. He went into considerable technical detail to explain the reasons for his conclusion and stated that in general such information and details are included in his teaching to medical students, though he has more occasion to discuss those matters with medical societies and groups in various parts of the country [R. 400-401]. In the case of eunuchoids, testosterone has been administered in the majority of cases but in some instances incorrectly because the case was not properly diagnosed [R. 407-408]. From his own research he was unable to make any statement as to the effect of the administration of methyl testosterone on the testes [R. 413]. The only way in which it could be determined

whether there had been any damage to the testes which in turn would tend to decrease fertility, would be an examination of a sample of the testes by microscopic examination [R. 414]. He said that the practice of taking a sample of the testes and examining them in that fashion was done very, very widely now and was a widely recognized procedure [R. 415]. When he stated that it was his opinion that methyl testosterone inhibits sperm production he meant that it was his opinion that that was the consensus of opinion [R. 415-416]. He is sure that any doctor who prescribed testosterone would warn the individual of the possibility that his fertility would be decreased and he thinks that that would be the practice of the general average practitioner in dealing with a person who the doctor found was suffering from symptoms associated with the male climacteric [R. 422]. It is undoubtedly a procedure that is done in some instances to administer testosterone to a person who manifests the symptoms associated with the male climacteric, and to assume that if, after taking testosterone, those symptoms are relieved, the man was going through the male climacteric. However, at the University, laboratory tests are made to determine whether he belongs in that category or should receive some other form of therapy [R. 428]. It is inevitably true that there is a difference between the method employed by a scientist such as the witness conducting his work in a university, or in experimental institutions, and the method employed by the average general practitioner. The factors of time, economic factors and many others enter into [R. 424].

(c) Testimony of Dr. Norris J. Heckel.

He is a urologist and professor of urology at the University of Chicago [R. 464]. In urology he uses testosterone only for the treatment of men who have a deficiency of the male sex hormone. The best illustration of such deficiency would be eunuchism, a disease in which the body has not been able to manufacture the hormone and consequently the individual has not developed as the normal male [R. 465]. Other types of persons who have a male hormone deficiency are those whose testes have been destroyed from some disease or who have been castrated [R. 466]. Hormone therapy would not correct impotence in a man in his late 40's unless it was due to a male hormone deficiency [R. 471]. If a man were suffering from a male hormone deficiency methyl testosterone would correct lack of sexual power and impotence, would postpone the many conditions associated with middle age and improve the sense of well being and would constitute an adequate treatment for flushes, sweats and chills, impaired memory, inability to concentrate on activities and a tendency to evade them, nervousness, depression, general weakness and lack of physical strength [R. 472-474]. There are many diseases other than such a deficiency that would produce those symptoms. If a man were suffering from such a deficiency methyl testosterone would result in impowered physical and mental work and would exert a tonic action resulting in renewed vigor and would impart a better attitude towards social life and cause nervousness, exhaustion and melancholy to disappear. Each of those symptoms are also symptoms of conditions other than a male hormone deficiency [R. 473-475]. A male hormone deficiency is determined (1) by a case history, (2) a careful physical examination and (3) laboratory tests to aid in the diagnosis such as the estimation of 17

ketosteroids in the urine and also by the estimation of the secretion of gonadtropins in the urine. There are no objective symptoms which would enable him to correctly diagnose a male hormone deficiency [R. 475-476]. In his opinion methyl testosterone will aggravate the growth of a prostatic cancer [R. 478-479].

On cross-examination he stated that if a patient called upon a general practitioner complaining of the several symptoms enumerated in his opinion the doctor would make a careful examination of the patient to see if he could find out the cause of the symptoms. He would conduct a complete physical examination from head to foot. If that produced nothing he would examine the urine to see whether there was any sugar in it which might give him a clue to diabetes which would produce such symptoms. If he found no sugar he would determine whether there was any albumin in the urine or whether the patient was suffering from Bright's disease or some kidney disturbance and an X-ray picture of the tract or the colon tract or a basal metabolic test to discover whether he had some disturbance of the thyroid. If the general practitioner found nothing suspicious as a result of that examination *he might but he shouldn't* suggest testosterone to the patient for a period of 4 to 6 weeks to see if those symptoms were relieved. He really doubts that the general practitioner would suggest testosterone for a period of time after the result mentioned of such an examination [R. 482-486].

He has never been able to make a diagnosis of the male climacteric. He knows that it is spoken of in the literature as a condition something comparable but not the same as the female menopause [R. 487]. It is frequently referred to in laymen's magazines and medical publications. There is no question about it at all that in view of the hundreds

of thousands of packages of methyl testosterone sold in the aggregate by the three principal manufacturers during the period of a year the product is indicative of considerable benefit to many, many men [R. 489]. From his own experience he believes that methyl testosterone accelerates the growth of a cancer of the prostate [R. 491]. He doesn't think that testosterone in any form causes prostatic cancer [R. 492]. The whole prostatic cancer problem and its relation to hormones is a relatively new thing [R. 493].

There are no blood tests or urine tests to determine the presence of cancer [R. 503-504]. He does not agree that the average general practitioner or family doctor who found what he believed to be a male hormone deficiency and who examined the patient to see whether cancer was present and found none, would try the man on testosterone to see whether he was relieved of the symptoms. The chances the 99 times out of 100 that he would find some specific reason for the man's symptoms [R. 506-507]. The large pharmaceutical concerns such as Ciba, Schering and Roche-Organon, who are the principal manufacturers of testosterone, send out lots of literature, maintain large research staffs and the information which they supply the doctors with in general is abreast of the times though he disagrees with some of it [R. 509-510]. He agrees with the statements reported to have been made by Dr. Hans Lisser and Dr. Robert Escamillo reported in "The Urology and Cutaneous Review," Volume 46, page 87 (1944), with respect to the effect of testosterone on the testes, and reading as follows:

> "On the other hand, there have been reported patients whose sperm counts increased after treatment to the extent that successful impregnation took place. Other authors have pointed out that both number

and viability of the spermatozoa can fluctuate during the continued use of androgens, or that the count is 'of minor significance as compared to the enormous improvement obtained in all other respects.' "

(f) Testimony of Dr. Elmer Belt.

Is a urologist [R. 515] and member of the Belt Urological Group [R. 516], a member of several scientific societies and has written several articles on medical and scientific matters [R. 516]. He thinks he has personally seen or treated patients who have had adverse results from the administration of the male hormone [R. 517]. He gave an example of a patient under his care who is suffering from cancer of the prostate and he thinks that the administration of testasterones which this person took very likely, very definitely influenced the growth of that cancer. The patient, incidentally, is a doctor of medicine. Cancer of the prostate is frequent in the decade between 50 and 60 and is much more frequent between 60 and 70 [R. 519-520]. In the case of the ordinary practitioner to whom a patient goes because he wants a general physical examination, the practitioner is obligated to place his finger in the rectum and carefully feel the prostate [R. 522-523]. There are many more things to know about cancer of the prostate than are known about it [R. 532]. He thinks that methyl testosterone is dangerous in that it could aggravate a cancer of the prostate [R. 533]. There are many instances in which methyl testosterone is very valuable. The precautions necessary prior to its use are tests, rectal examinations, the level of acid phosphatases in the blood stream, and two other tests of very recent origin, comprising a test of proteins of the blood and a blood protein test. These tests are a prerequisite except in groups where cancer of the prostate is not liable to

occur and by that he means cases in which it is particularly valuable or the groups of young individuals who show a definite endocrine deficiency in regard to testosterone and who need it in the normal process of their growth and development [R. 535]. He is referring to boys who had their testicles blown off in the war and persons suffering from hypogonadism, persons whose testicles are not performing their proper function, meaning undeveloped testicles and undeveloped genitalia, a young individual whose testicles are not up to standard in size and in function [R. 655, 656]. The acid phosphates test is one which can be completed in a few minutes if one is set up for it. The 17 ketosteroids requires approximately a week to complete and the blood test a very short time. The general practitioner is not equipped to make either of those tests and in fact his office is not equipped to make the 17 ketosteroids test and he is having them made at the California Institute of Technology [R. 659]. In a person who is apparently normal physically, the examination necessary to determine whether he is suffering from an endocrine deficiency might possibly be the 17 ketosteroids test [R. 536]. The examinations he has referred to require special training. There are no objective symptoms of a male hormone deficiency which a layman could recognize and use to diagnose such a condition [R. 537]. After a careful examination of the patient and no indications of cancer of the prostate being present, *it would still be dangerous and conducive to the development of cancer of the prostate for the person to take testosterone* [R. 538-540]. In his opinion if a man 40 to 50 years of age called on a general practitioner and stated that he was troubled with sweats, nervousness, did not remember things as he used to, couldn't concentrate on activities and had a tendency to

evade them, and the doctor was of the opinion after learning of these symptoms that testoterone might be of benefit to the patient, the general practitioner would, before prescribing it in the first place think—think about the problem and if he thought about it very much he probably wouldn't prescribe testosterone for those symptoms, because they do not indicate hypogonadism and it is virtually only in hypogonadism that testosterone is effective [R. 648-649]. A very careful analysis of the problem would be made for that patient and he would be very apt to get it at the hands of an alert general practitioner [R. 650]. It would be a very loose method of detecting the man's trouble for the general practitioner to prescribe testosterone to the patient for a period of 3 to 4 weeks to see whether the man had been relieved and if the doctor really thought about the problem, got down to business and studied it, he would be concerned first about the psychic features in the individual and whether he was overworked and troubled. Before prescribing testosterone the general practitioner would certainly make a rectal examination. *There would be no blood tests which such a doctor need do unless he wishes to do the acid and alkaline phosphatase test. The urine test would not show him anything unless he wished to take the time to give the 17 ketosteriod tests* [R. 650-651]. *If he really wanted to find out whether the man had a hormone deficiency he would give such a test, as well as the acid phosphatase test for cancer of the prostate and if he used testosterone then he would say that the symptoms were not relieved* [R. 651-652].

The problem of hormone deficiency is the specialty of the general practitioner. The middle age man who is tired and worn out and who has come to the doctor for some help is the general practitioner's "meat" [R. 653].

In the case of the individual who comes to the general practitioner, who gives him a rectal examination and finds nothing suspicious and prescribes methyl testosterone for him and the prescription given him is filled, that patient may return to a drug store as often as he wishes and have it refilled without going to the doctor or any other doctor and obtaining a new prescription everytime he wants it. He can go back and have it refilled as often as he wants without ever seeing another doctor [R. 662-663].

He does not think that the male has any climacteric and he believes most careful observers are of the same opinion. This opinion, however, is not universally shared by the profession [R. 669].

(g) Testimony of Dr. Chas. Huggins.

Professor of Urology, University of Chicago; holds several degrees and is a member of several societies and has written many papers on urological and scientific subjects. Since 1938 his practice has been almost exclusively related to the male hormone and its action in normal and cancerous individuals [R. 540-542]. He does not believe that a male hormone deficiency occurs in quasi-normal individuals—people who are not hypogonads or who have not been castrated. Testosterone accelerates the growth of cancer of the prostate [R. 562, 566-567]. As to the blood tests to determine the presence of cancer of the prostate, the ordinary general practitioner is not capable of conducting such tests unless he is chemically minded, but the average, good-sized hospital can determine it [R. 569-571].

The blood test he referred to can only be done in well established hospitals. He does not believe that there is

such a thing as the male climacteric, though there is a difference of opinion on that subject in medical circles and there are a great many articles in which the male climacteric is discussed but he does not share the opinion of those investigators [R. 581-582]. He, the witness, is a professional investigator [R. 588]. Eliminating eunochoids castrates and women, he does not think they have been prescribed in his hospital—University of Chicago—for the last 5 years. *He disagrees* with the statements concerning the male climacteric by Drs. Hans Lisser and Robert F. Escamilla appearing in Volume 46 "The Urologic and Cutaneous Review," page 87, February, 1942, entitled "Testosterone Compounds in the Male. Clinical Indications and Methods of Administration," under the heading "Male Menopause" and reading as follows [R. 589]:

> "Until recently the male menopause has been ignored except for rather bizarre attempts at rejuvenation by testicular graftings or by tying the spermatic cord (Stenach's operation). Perhaps this neglect was due to the conception that the male menopause consisted merely of the natural diminution and final loss of libido and potency in advancing years. Little heed was given to the less obvious but more important manifestations consisting of mild vasomotor flushes, increasing irritability, failing memory and decreased capacity for mental effort. The customary day's work is not accomplished as speedily, as cheerfully or as effectively as before. We are inclined to believe that during this period conservative androgen therapy is indicated and may be highly beneficial. However, care must be exercised to avoid undue sexual stimu-

lation, especially in men (314) between 50 and 70 years of age who suffer from hypertension or show evidence of arteriosclerosis or myocardial damage."

He disagrees with the statements of Dr. Harry Benjamin on the subject of impotence and its treatment by testosterone appearing in the "Urologic and Cutaneous Review," Volume 50, page 143, March 1946, and reading as follows [R. 590-591]:

> "As for gratifying general results, they were observed in 72% of the cases in the group receiving parenteral treatment, and in 71.4% of the patients who were given methyl testosterone. These figures are in close agreement and indicate that there is no difference in the general response irrespective of the compound administered. Improvement of appetite, gain in weight and physical strength, amelioration of urinary disturbances and increased memory, endurance, ability to concentrate, etc., were frequently observed in both groups."

He also disagrees with the views of Dr. August A. Werner set forth in the Journal of Urology, Volume 49, page 82, June 1943, entitled "The Male Climacteric: Additional Observations of 37 Patients" and reading as set forth on page 591 to and including page 597 of the record. (We have eliminated quoting that article because of the extensive character of it.) With regard to Dr. Werner's article, he said that the statements of the author are *"absurd"* [R. 597].

2. EVIDENCE CONCLUSIVELY IMPEACHING DOCTORS HECKEL AND BELT.

Notwithstanding the elaborate tests which Drs. Belt and Heckel both stated were an absolute prerequiste to the prescription of testosterone as reflected in their testimony hereinabove narrated, the following took place with respect to Dr. Belt subsequent to the date on which he gave his direct testimony:

(a) Testimony of Allen H. Parkinson.

On June 24, 1949, Allen H. Parkinson went to Dr. Belt's office on Wilshire Boulevard, arriving there about ten o'clock a. m., asked the receptionist if he could see one of the doctors and was referred to Dr. Ebert, who asked him what he was there for and he told him that he would like some testosterone. The doctor asked him if he had ever taken it before and he replied that he had two years ago in Salt Lake City, that a Dr. Openshaw had prescribed some [R. 866]. He told the doctor that he had been troubled with diminishing of the testicles and penis. The doctor asked him if he was taking it then and he replied "No," but that he continued taking it at frequent intervals because it had a tonic effect and made him feel better. The doctor asked him if a 50 mg. shot of testosterone propionate would be satisfactory and he replied that it would. He was then ushered into another room and in a few seconds a laboratory assistant entered and took a blood sample and left the room and Dr. Belt came in, gave him a brief rectal examination and left. Then another technician came in and injected him with a 50 mg. shot of testosterone propionate. Dr. Belt asked him what he wanted on the prescription, how many tablets he would like. Mr. Parkinson stated that he would like 100 10 mg.

tablets and Dr. Belt said "All right" and had him urinate in three glasses. He asked him how he took them and he replied that he took three or four a day and then maybe laid off three or four days depending upon how he felt and then he resumed [R. 867]. Dr. Belt asked him what the doctor in Salt Lake charged him and he replied "$5.00" and the doctor said "All right pay the girl $5.00 on your way out." At that time the doctor wrote a prescription for him, which the witness identified at the time of trial. He paid the girl $5.00, obtained a receipt and identified the receipt at the trial [R. 868].

(b) Rebuttal Testimony of Dr. Belt.

Dr. Belt's redirect testimony was interrupted during the course of the trial by reason of commitments that he had elsewhere. It was on June 24, 1949, the day after Dr. Belt's first appearance on the witness stand, that Mr. Parkinson made the visit to his office above related. Following that visit Dr. Belt was called to resume his testimony for the Government and undoubtedly in realization of the fact that the prescription given Parkinson was at variance with his former testimony, he gave the following answer to the following question [R. 692]:

> "Q. Now, you mentioned the precautionary examinations that were given. Assume for a moment, Doctor, that the patient told you that he was referred by another doctor who gave him such drugs from time to time, would that change the procedure at all? A. Well, if a patient comes to me referred by another physician (436), I always allow the other physician the benefit of whatever doubt that might exist in my mind and my tendency is to go on with the original treatment he has established until I can communicate with him and discuss the problem with him. It is

possible that the patient may not tell me things that he has communicated to his other physician. It is possible that I may not see things in that patient that the other physician saw. So, in the first place, a generously disposed human being would not say right away, 'Oh, your doctor is doing the wrong thing. My goodness, this is the trouble.' But you would conform to the treatment until you had an opportunity for discussion and coming to a common understanding of that."

Then, following Parkinson's testimony, he was called on rebuttal and testified with reference to Parkinson's visit as follows: He treated Parkinson professionally on June 24, 1949. The examination was in his clinic in Los Angeles. Parkinson told him that he had been taking testosterone over a period of about two years. When he went into the room where Parkinson was he reviewed the history which a doctor in his office had taken. Parkinson said that he had been receiving a weekly maintenance dose of 50 mgs. of testosterone. The doctor was testifying from some notes which he said were made at or about the time of the events which they purport to reflect and made in the usual course of business [R. 938]. Parkinson asked him for a prescription for 10 mgs. of testosterone three times a day. He asked for the injections and said he was going to San Francisco and wished to have a maintenance dose to take with him. He said that he had been referred by Dr. Openshaw [R. 939]; that two years prior to that visit his testicles and penis had begun to atrophy and he became sexually impotent; that Dr. Openshaw of Salt Lake City had been treating him with a weekly maintenance dose of 50 mgs.; that he had been away from Salt Lake City for three weeks and his physician recommended that he come to Dr. Belt for treatment.

The doctor stated that he made a complete examination of Parkinson, a complete general physical examination. Parkinson took off his clothes and he examined him by first observing his general makeup, and his eyes, his pupils, his pharynx, his teeth, felt his thyroid, examined his thorax, took his blood pressure, determined his pulse rate and rhythm, felt of his abdomen, looked at his extremities, tapped his reflexes, examined his external genitalia, put a finger in his rectum and examined his prostate and found no contraindications for the use of testosterones [R. 940]. He instructed his technician to take a blood sample and he had already urinated in three glasses and that material was examined. The blood sample was taken because the patient told him that he intended to return and the doctor wanted to know whether or not the acid or alkaline phosphatase had changed. He gave him a prescription for testosterone and he did so because Parkinson had told him that he was under the treatment of Dr. Openshaw of Salt Lake City. He told Parkinson before he began the examination that the reason for it was that they examined people carefully who asked for testosterone or who were getting it to be sure it wasn't doing any harm. He also stated as follows:

> "I did not wish, of course, to undermine Dr. Openshaw's authority with his patient. This man presented himself to me as a transient actually under the care of another physician, and it would have been poor policy and poor judgment on my part, as well as poor medicine, to interfere with the activities of his own physician." [R. 941-942.]

The doctor's notes which he read in testifying were read into the record and showed the following [R. 943]:

"Q. I would like to read into the record, if I may, the portion of it starting down here with [831] 'Complaint.'

If you want me to read the rest up at the top, I will.

Mr. Neukom: Read any part you want.

Mr. Elson: All right.

Q. Commencing with 'Complaint,' 'Testosterone shots only.'

What is that (indicating)? A. History and physical.

Q. History and physical? A. Wait a minute. Past history.

Q. What is this? A. H. P., past history.

Q. Oh, H. P. A. I guess that is history and present ailment.

Q. H. P. I.? A. History of past illness.

Q. History of past illness. It reads as follows: Two years ago, this man's testicles and penis began to atrophy and he became sexually impotent. Dr. Openshaw of Salt Lake City has been treating him with a weekly maintenance dose or 50 milligram testosterone Neo-Hombreol. He has been away from Salt Lake City for three weeks. His physician recommended that he come here for the same shots. He will be leaving here for San Francisco shortly. Wants oral prescription for Metandren 10 milligram tablets.

On the reverse side, what is this? [832] A. Ear, nose and throat.

Q. What is this up here (indicating)? A. Present illness, 'P. I.,' it looks like.

Q. And something here. 'P. I.' the doctor says indicates present illness. The nose, ears, eyes and

throat, what is that? A. Tonsillectomy and adenoidectomy.

Q. Tonsillectomy and adenoidectomy. And then over here, 'No venereal disease, no surgery, general health excellent; two children.' What is that (indicating)? A. 'Daughter, age 13—and a boy aged 6 and a girl aged 4.'

Q. Boy aged 6 and girl aged 4. What is that (indicating)? A. 'Living and well.' "

With reference to the $5.00 charge for this examination, the Court asked a question and the doctor answered as follows [R. 945]:

"Q. (By the Court): There is just one little item. The witness Parkinson testified that he paid you at your demand $5.00 for a treatment. How does that correspond with a similar treatment? For a new patient who would not come from another doctor [834]? A. If this patient had not been referred to me from another doctor and if this were not a routine thing, a routine procedure, we would have charged him very much more for this entire procedure. Of course, $5.00 wasn't the total charge here. We explained to him that the laboratory test would be $6.50, which he said that he would like to have us bill him for to this false address that he gave us. This is a purely courtesy situation here. A patient comes in; he is being treated by another doctor in another city; we do our best to oblige both the doctor and the patient by carrying on the procedure that the doctor feels is indicated. I asked him what Dr. Openshaw charged him for this treatment and he said $5.00. As a matter of fact, $5.00 is close to the cost of 50 milligrams of testosterone propionate. I don't know actually what the cost is to our office from the pharmacy but it is

not under that. We charged him the same thing that his doctor charged him, as a matter of courtesy to that doctor, and we didn't charge him for the physical examination and for the urine analysis; nothing else except for the laboratory test."

(c) Testimony of Hannah Shinglman.

Testified that on June 27, 1949, she went to the office of the Elmer Belt Urologic Group in Beverly Hills [R. 892]. She walked into the office, asked to see Dr. Belt and was told that he was not there. She asked to see another doctor and was told that Dr. LeTourneau would see her. He came into the office and asked what he could do for her and she told him that she and her husband had been here for six or eight months and previous to that time her husband had not been feeling well for the past few years; that he had been very nervous, was jumpy and irritable, and she assumed that he must be going through the male change. She told him that a doctor in Chicago had given her husband some shots and that he had done so well that the doctor had put him on tablets. She showed him a bottle and said that he had run out, and Dr. LeTourneau then gave her a prescription for these tablets which were for 100 testosterone linguets, 25 milligrams, stating that one was to be taken daily. She identified the prescription that she received at that time at the time of trial. Dr. LeTourneau told her that if she liked, perhaps her husband would like to come in for an examination. She told him that her husband was quite busy and in the meantime he wrote out the prescription in her presence [R. 892-894].

(d) Rebuttal Testimony of Dr. Le Tourneau.

Dr. Le Tourneau was called in rebuttal and stated that he was an M. D., a member of the Belt Urologic Group and recognized Mrs. Shinglman as having been in his office on June 27, 1949 [R. 947]. When she came into his office he thought she was a new patient and she told him that a Dr. Willard Shinglman of Cicero, Illinois, was her husband's brother, and that he had directed her to their office and that Dr. Shinglman has been giving his brother testosterone linguets [R. 948]. He advised her that she should have Dr. Shinglman write them a letter regarding the patient, explaining his findings and the need for the linguets and "we would gladly provide a prescription for Metandren linguets" and he gave a prescription for 100 tablets. He did not see her husband at all but told her that she should bring her husband in for an examination [R. 949].

(e) Testimony of Hazen S. Parkinson.

With reference to the testimony of Dr. Heckel which has hereinbefore been narrated, and particularly with respect to the tests that are and should be administered prior to prescribing testosterones, the following evidence was introduced by the defendants:

Hazen S. Parkinson, the father of Allen H. Parkinson, drove to Chicago with his son and arrived there June 27, 1949 and went to the office of Dr. Norris J. Heckel shortly after one o'clock in the afternoon. He told the nurse in Dr. Heckel's office that he wanted to see Dr. Heckel [R. 898-899]. In a few moments she took him into another room and a few moments later the doctor came in. Mr. Parkinson introduced himself, showing him a bottle with a label on it "Metandren Linguets, 500" and told him he wanted to get the bottle refilled. He showed him a pre-

scription that he had from Dr. Openshaw for testosterone by injection. He told Dr. Heckel that he was going on a ship [R. 904-905]. The doctor stated that he had just come from Los Angeles from a trial [R. 905]. Mr. Parkinson asked him if there was anything wrong with taking the tablets, anything that would be dangerous, that if there was he didn't want them, and the doctor replied, "Oh, no, I don't know as they will do you any damage, but we don't want them sold over the counter." The doctor had him urinate in a glass and he placed his finger in Mr. Parkinson's rectum and wrote out a prescription for him in his presence. Nothing was said by the doctor on the subject of fertility or sterility. He told the doctor that on the ship he would be rooming with other men. When he told him that he wanted 500 tablets the doctor remarked that that was quite a few, that they were expensive, and Mr. Parkinson replied, "Well, if you have ever been on a ship, there are three or four men to a room and every time you take a pill someone else wants one." [R. 906.] The doctor asked him how he took them and he replied one or two a day, according to how he felt, and the doctor replied that he would put down one a day and he could take them the way he had taken them before. About five or six minutes was consumed from the time he walked into the doctor's office until he walked out with the prescription [R. 906-907]. Mr. Parkinson at the time of his visit to Dr. Heckel was 65 years old. He showed him his Merchant Marine card [R. 908]. He told Dr. Heckel that he was trying to go to sea and that he was gone from this country for long periods of time when he got on a ship and that he wanted enough testosterone for a year not only for himself but such other sailors who might want one now and then [R. 911]. Dr. Heckel absolutely did not tell him to report to his physician at regular intervals [R. 912].

(f) Dr. Heckel's Letter in Rebuttal to Hazen S. Parkinson's Testimony.

In the interests of saving time, counsel for the defendants stipulated with the Government that if Dr. Heckel were called on rebuttal he would testify in accordance with the letter sent by him to Government counsel following Mr. Parkinson's visit to him. The stipulation was as follows [R. 923]:

> "It is stipulated and agreed that, if Dr. Norris J. Heckel were present and sworn as a witness to testify, and did so testify, he would testify that, on June 27, 1949, a Mr. Parkinson came to his office in Chicago and stated that he had been referred to by a former patient. Parkinson said that he was 72 years of age, a sailor by occupation and gone from the country for long periods of time; that he was in Chicago as a transient; that his doctor in Salt Lake City had been giving him a prescription for methyl testosterone and that he had been taking this drug under his doctor's direction for the past several years; that he was leaving the country and needed about a year's supply of testosterone and requested a prescription for a year's supply. He showed Dr. Heckel a prescription for testosterone issued by another doctor. Dr Heckel then made a physical examination of Parkinson, which included a urine analysis and a rectal examination of the prostate and found no contraindication to the use of testosterone; he found that Parkinson's prostate was of normal size, shape and consistency, with no evidence of prostatitis; and that he then renewed Parkinson's prescription for methyl testosterone linguets and advised him to report to his physician at regular intervals."

3. THE EVIDENCE OF ALLEN H. PARKINSON AND HAZEN S. PARKINSON, COMPLETELY AND INCONTROVERTIBLY REFUTED THE TESTIMONY OF THE GOVERNMENT WITNESSES ON THE SUBJECT OF TESTS GIVEN BY THE GENERAL PRACTICING PHYSICIAN PRIOR TO PRESCRIBING TESTOSTERONE.

(a) Testimony of Allen H. Parkinson.

Allen H. Parkinson testified that on June 30, 1949, he called at the office of E. A. Gummig at Pasadena, California [R. 869] and asked for and received a prescription for 100 methyl testosterone linguets; that at no time during his visit did the doctor lay any hands upon him and he was not in Dr. Gummig's office over a minute [R. 870].

(b) Testimony of Hazen S. Parkinson.

During the course of Hazel S. Parkinson's testimony at the trial of the criminal actions, an offer of proof was made as follows [R. 902-904]:

> "I also offer to prove that Mr. Parkinson called on several doctors, on the dates mentioned on certain prescriptions, throughout parts of Los Angeles County, and talked at random; that in each instance he went into the doctor's office, told the doctor that he wanted this same bottle, the one he used when he saw Dr. Heckel, refilled, and asked for a prescription; that in each instance he received a prescription for [764] these linguets and on no occasion was anything said to Mr. Parkinson about sterility or fertility or cancer of the prostate, nor did any of the doctors lay a hand on him, and he did not call on any doctor who turned him down on the request for a prescription.

"The doctors that would be subject to Mr. Parkinson's testimony in that regard would be Dr. G. G. Ferbryck, M. D., 516 Professional Building, 117 East 8th Street, Long Beach, California, who wrote out a prescription for Metandren Linguets, one a. m. and p. m., and the date was June 29, 1949; Dr. Wayne P. Hanson, in the same building, on June 30, 1949, wrote out a prescription for 500 10-milligram Metandren Linguets, directions, one linguet daily; that he also called on Dr. George D. Stilson and Dr. Milo Ellik, together in the same office, 511 Professional Building, 117 East 8th Street, Long Beach, on June 30, and received a prescription from Dr. Ellik for 500 Metandren Linguets, directions, as directed; that he called on Dr. Raymond W. Kelso. On June 31, 1949, the doctor's address being 117 East 8th Street, Long Beach, who wrote out a prescription for 250 10-milligram Metandren Linguets, with directions, dissolve one on tongue each day; that he called on George B. Hanson, M. D., 716 Professional Building, 117 East 8th Street, Long Beoch, on June 30, 1949, received a prescription for 250 Metandren Linguets, 10 milligrams, directions, one per day; that he [765] called on Dr. H. F. Gramlich on June 30, 1949, address, 117 East 8th Street, Long Beach, and received a precription for one bottle of Metandren Linguets, directions, as directed; that he called on Dr. P. W. Prince of the Bishop Clinic Staff, 117 East 8th Street, Long Beach, on June 30, 1949, and received a prescription for 250 10-milligram Metandren Linguets, directions, I guess it is, one daily, dissolve in mouth; that he called on Dr. L. L. Wiltse, 714 Professional Building, 117 East 8th Street, Long Beach, on June 30, 1949, and received a prescription for 500 Metandren Linguets, directions, take as directed; that he called on Dr. Marvin R. Lauer, 829 East Compton

Boulevard, Compton, California, on July 2, 1949, and received a prescription for 500 Metandren Linguets, 10 milligrams, directions, use as directed; that he called on Dr. Francis J. Ort, 107 North Santa Fe Avenue, Compton,California, on July 2, 1949, and received a prescription for 500 Metandren Linguets, directions, two daily; that he called on Dr. L. C. Lowe, 706 South Hill Street, Los Angeles, on July 1, 1949, and obtained a prescription for 500 Metandren Linguets, 10 milligrams, directions, as directed; that he called on Dr. Glenn E. Jones, 403 West 8th Street, Los Angeles, on July 1, 1949, and received a prescription for 500 Metandren Linguets, 10 milligrams, directions, one or two per day; that he called upon Dr. R. L. Byron, 1015 Chapman Building, 756 South Broadway (766), Los Angeles, on July 1, 1949, and received a prescription for 500 Metandren Linguets, 10 milligrams, directions, one as directed."

At that trial the offer was refused. However, in the stipulation as to the record in the injunction proceeding, No. 10391-HW, it was stipulated that:

"If Mr. Hazen S. Parkinson were called to testify in this proceeding, he would testify, if permitted, in accordance with the offer of proof set forth on pages 762-767 of the transcript of record in the criminal trial [R. 269]."

(c) Stipulation re: Further Evidence of General Practicing Physicians.

A stipulation was entered into by counsel for the purpose of conserving time and this stipulation was as follows [R. 929]:

"Mr. Danielson: If the court please, in an effort to conserve time, again, it is agreeable between

counsel for the government and counsel for the defense that the government could produce additional general practitioners who would (810) merely serve to corroborate the testimony of Dr. Terrill, and likewise, that the defense could produce additional general practitioners who would tend to corroborate their general practitioners, and we are willing to stipulate as to that fact and to eliminate further testimony of this nature."

That stipulation would, of course embrace as well the testimony of the defense doctors which now follows:

4. TESTIMONY OF DEFENSE WITNESSES.

(a) Dr. William A. Swim.

Was called as a witness for the defense. Is a Doctor of Medicine, received his degree in 1915, has been connected with several hospitals, commenced practice in Los Angeles in 1918 and has specialized in internal medicine since that time. Internal medicine consists of the diagnosis and treatment of non-surgical diseases, non-obstetrical. He was formerly a member of the Board of Medical Examiners of the State of California [R. 835-836]. If a male in middle life comes to him and complains of nervousness, flushes, sweats, chills, general weakness, lack of physical strength, impaired memory, inability to concentrate on activities and a tendency to evade them, his practice in dealing with that patient and those symptoms is to take a general history of the person and past illnesses. He makes a physical examination, including the head and neck, chest and abdomen, prostate and rectum reflexes, general appearance of the skin and if he finds no evidence of disease of a specific nature he prescribes testosterone or administers it. He has done so on many occasions and

since there has been testosterone, which has been for the last ten years, in commercial quantities, he has done so, all with an ever increasing number of cases and on many of those occasions he has found that after administering the drug the person's symptoms appeared relieved. On no occasion on which he has ever administered it has he ever encountered any adverse results [R. 835-837]. He associates the male climacteric with a diminution of the secretion of the interstitial cells of the testicle. This usually occurs in men around 50 who complain of fatigue, lack of concentration, loss of memory, loss of appetite, sleeplessness, sometimes a sense of heat in the body and profuse perspiration [R. 837-838]. His attention was called to the elaborate procedures which the Government witnesses testified were necessary to be followed prior to the administration of testosterone and he stated that he did not follow those procedures but rather he would do just what he had said he would do [R. 838-839]. In his opinion the attitude of the average patient would be to refuse to follow such elaborate procedures if they were suggested to him as conditions precedent to the administration of the drug [R. 839] and that he would go to some other doctor who would not go through that procedure [R. 840]. In his practice he prescribes testosterone approximately once a week and has injected testosterone propionate into other doctors on more than one occasion and prior to such injections he did not conduct a rectal examination nor did the doctor patients ask for it [R. 840-841]. He does not share the opinion of Dr. Heckel that men in middle life do not generally have a deficiency of the male sex hormone because their concentration of hormones is below its maximum. With reference to the individual to whom he would administer or prescribe testosterone if the individual came back to him in three

or four weeks and the symptoms had disappeared or seem relieved, he would conclude that he had supplied with a hormone in which he had been deficient. If the symptoms were not relieved he would change the dose and if that kept on and no result was accomplished he would try something else [R. 840-841]. It is not his practice to conduct the elaborate tests testified to by Dr. Heckel and he is unaware of any other doctors in this locality that conform to such tests. Never in his experience has he performed a biopsy of the prostate to determine the presence of cancer and such a biopsy if made would not be conclusive in that part of the tissue that might be taken out might not be the part affected [R. 842]. He very seldom encounters cancer of the prostate and he thinks that he has seen three in his thirty years of practice. He disagrees with the testimony of Dr. Heckel as to what the general practitioner would do in the way of tests on which an individual complaining of nervousness. etc. prior to the administration of testosterones [R. 843-844] and he has never conducted such tests before prescribing the product and has never known of any other doctor who has done so other than in the experimental field. He has read articles on the subject of testosterone in its relation to cancer of the prostate and as a result of his reading it is not his opinion that it will accelerate the growth of such a cancer, or, within the doses involved, be dangerous [R. 843-844]. It would be impossible to know how much testosterone over and above that which the individual naturally produces would accelerate cancer of the prostate if it would at all, because cancer has no particular line of progress. It is the one lawless thing in human pathology. It may lie dormant for many years and may flare up without any provocation, grow rapidly

and destroy life in a very short time. The pathology of cancer is not understood and there is no orderly procedure of it [R. 845-846].

He has never found 25 to 50 mgs. of methyl testosterone daily to induce sterility [R. 846]. With reference to the testimony of Dr. Nelson that the effect of testosterone upon the sperm producing activities is determined by a biopsy, taking out a tissue of the testes, Dr. Swim stated that he knows of no instances where that has been done notwithstanding Dr. Nelson's statement that it was very widely done today [R. 847-848]. He has read some of the literature on the subject and in his opinion as a result of that reading testosterone will not affect sterility, and such of the literature as he has read is divided on the question [R. 848-849].

(b) Dr. George E. Fakehaney.

Testified as a witness for the defense. Graduated from Loyola University in Chicago in 1937 with the degree of M. D. *cum laude.* Was resident physician at the Good Samaritan Hospital, Los Angeles in 1939, and has been admitted to practice in California since 1938. Is a member of the Los Angeles County Medical Association and Hollywood Academy of Medicine [R. 740-741]. Is engaged in general practice as a medical consultant or examiner for Technicolor Motion Picture Corporation, Samuel Goldwyn Studios, and Radio Corporation of America [R. 742]. In his practice has never used a blood or urine test for detecting cancer of the prostate. Doctors in general practice do not use that type of examination. He knows of no other examination besides rectal examination commonly used by doctors in this locality to detect cancer of the prostate [R. 743]. He has read literature on

the subject and some of it suggests that methyl testosterone might possibly aggravate a cancer of the prostate but the literature is not uniform on the subject. There is much confusion on the subject. He has encountered cancer of the prostate on an average of about once a year [R. 744]. During the war he gave thousands of physical examinations. Among other things, he was the doctor who gave them for the Hughes Aircraft Corporation and he conducted an average of 20 to 25 per day and he found no cancer of the prostate to exist except on very rare occasions [R. 745]. He has prescribed testosterone in his practice on an average of about once a day and has never encountered any adverse results from the use of it [R. 745]. He has experienced no danger in the use of testosterone [R. 746]. Testosterone is commonly given to a patient anywhere from 45 to 70 who complains of unusual weakness, loss of memory, etc. It is given particularly when there is nothing else that you can point to as causing the symptoms. When a patient calls on him and complains of those symptoms, he usually talks with him for a few minutes to see if there is anything else that bothers him, or whether he has had any type of medical care and if he determines that the patient does not have any organic pathology he prescribes or injects the male hormone and trys it for a certain period of time. Usually a month's supply. Many of the persons for whom he has prescribed it have obtained benefits and some have not and in the latter case he determined that the hormones were ineffective in their cases, that is, they were not suffering from hormone deficiencies. That it quite the usual procedure in the practice of medicine. In the practice of medicine to a large extent it is a method of trial and error to follow a certain course of treatment to see whether it will be beneficial [R. 748-749].

With reference to the testimony of Dr. Huggins [R. 566] that *"occasionally we are forced to do things to human beings in a few cases to make a few observations that are not strictly in the patient's best interests"* it was not his practice to experiment with patients. That is done in laboratories [R. 751]. In his practice he finds impotence on occasion to be psychogenic in origin and sometimes not, but he has prescribed testosterone for persons who complained of impotence and has had on occasion good results [R. 752]. With reference to Dr. Heckel's statement that the administration of testosterone would destroy the seminiferous tubules, it has very rarely been mentioned to do that and he does not know how it could be proven, particularly when you are dealing with a human being [R. 752-753]. He knows of no doctors in this locality who submit patients to the tests mentioned by Dr. Heckel [R. 753]. He has never heard of any doctor performing a biopsy of the prostate and it is certainly not common practice to do so. A biopsy of the prostate is commonly done by inserting an instrument through the penis and cutting a piece of the prostate gland [R. 754-755].

(c) Dr. Paul E. Travis.

Graduated University of Southern California, A. B. 1941, Phi Beta Kappa, University of Iowa 1942, Masters degree in physiology, M.D. degree University of Southern California 1946. Two years in the service at the Veterans Hospital, Arizona, returning to private practice 1948. Has used testosterone in his practice and used it at the Veterans Hospital. Is familiar with the male climacteric. The symptoms usually associated with it, loss of libido—sexual drive—loss of a feeling of sense of well being,

nervousness, irritability, sleeplessness, has had many patients of middle age complain of those symptoms, and on some of those occasions has prescribed testosterone [R. 788-789]. Some of those patients after they returned following treatment appeared very definitely relieved [R. 790]. With men to whom he has prescribed it, they appear to sleep better, gain weight—those who have been losing weight—improves the appetite, imparts a general sense of well being and better able to concentrate. When a person complains to him of such symptoms, he tries him out on the drug and if it helps him he concludes that the man suffers from male hormone deficiency [R. 791]. The usual doses are 25 to 50 mgs. per day in tablet form. With regard to the tests mentioned by Dr. Thienes that would be followed by a general practitioner, he stated that a general practitioner does not have the time nor does the patient usually have the funds to undergo such expensive laboratory determinations and he never does it and he knows of no other doctors that do so. In the practice of medicine it is common to diagnose a person's condition and give him what he thinks will relieve him and if that does not work try something else. That is the practice of medicine [R. 792-793].

At the Veterans Hospital many of the patients were hospitalized and many were veterans past middle age, with concomitant physical ailments, such as asthma, etc., whom they felt would be given added energy perhaps to make them ambulatory if given testosterone. They were given testosterone and their amount of energy increased as well as their sense of well being and they improved. Prior to

giving testosterone to such patients, they just gave them a general physical examination, eye, ear, nose, throat, heart, lungs, abdomen and prostatic. A prostatic examination takes about thirty seconds. In his experience he has never encountered any adverse results in the use of testosterone [R. 794]. He does not agree with Dr. Heckel that males of middle life do not suffer from a deficiency of the male hormone and has found the contrary to be his experience. He does not follow the elaborate tests mentioned by Dr. Heckel because that has to do with a specialist's laboratory [R. 795]. The 17 ketosteroid test is a rare test and he knows of no doctors in his section of town who make that test prior to prescribing testosterone. He has never performed a biopsy upon a person's prostate to determine whether it was cancerous but he has referred patients to a urologist if he suspected cancer. He knows of no general practitioner who performs such a biopsy and if a doctor suggested it to a patient the patient would probably never come back [R. 796-797]. With respect to the elaborate tests mentioned by Dr. Heckel, he said that no general practitioner could afford to follow that test on any patient before giving him such a simple medicine as testosterone and he knows of no doctors who do [R. 798-799]. He has read literature concerning testosterone and its relationship to cancer of the prostate. The articles are pro and con on the subject. Based on what he has read and from his experience, he absolutely does not consider testosterone to be dangerous [R. 799-800]. With regard to the literature received from the three principal manufacturers of testosterone, he considers it authentic and states that it is the practice of other doctors that he knows of to rely upon it as it is one of their main sources of current information.

(d) Testimony and Affidavit of Martin A. Clemens.

Is a pharmacist, admitted in 1927, and purchased testosterone from Roche-Organon Company, Ciba Pharmaceuticals Supply and Schering Corporation, and received literature from those corporations in connection with the products purchased from them [R. 696-697]. Since 1943 he has sold between 4,000,000 and 5,000,000 tablets of testosterone. Originally they were sold in boxes of 15, 30 and 100 and later the manufacturers changed them to 30, 100 and 500. A very small percentage of his business comprised the 15 tablets to a box containers—about 20% —about 70% comprised the sale of the boxes containing 30 tablets to a box and about 10% comprised the sale of 500 to a box [R. 698-700].

With regard to the Government's Exhibit 18 [R. 983], which was a letter from Roche-Organon, Inc., the witness stated that notwithstanding the letter, the literature supplied by the manufacturer with the product purchased by him was supplied to him in large numbers [R. 719]. He was told by the manufacturers' managers to ignore the letter, that it was merely put out to appease the medical profession and they kept supplying him with other literature from then on [R. 735]. They said that they had to keep the product council-accepted with the medical profession [R. 735-737].

By the stipulations as to the record in both consolidated cases [R. 266, 150], the affidavits of Martin A. Clemens [R. 55], the supplemental affidavit of Clemens [R. 119], and other supplemental affidavit of Clemens [R. 107] were made part of the record in the case before the court in the injunction proceedings, as well as the affidavit of Eugene M. Elson [R. 49]. The affidavits of Allen H. Parkinson were likewise made part of that record.

In the affidavit of Clemens [R. 55] was set forth an analysis of the charges made in each of the counts and the information in the criminal action, No. 20596, Criminal [R. 56-64]. No affidavit was submitted in opposition to that analysis. Following that analysis a recapitulation of the charges was set forth in Clemens' affidavit, reading as follows [R. 64-65]:

> "Recapitulating the aforesaid charges insofar as the same are material to this litigation, the charges of the government [in the criminal case] were that the labeling of said products so shipped constituted a misbranding of said products for the following reasons:
>
> 1. That said labeling falsely represented and suggested that said products would be efficacious in the treatment of the conditions enumerated hereinbefore under the discussion as to Count I in violation of Section 502(a) of the Food; Drug and Cosmetic Act.
>
> 2. That said labeling failed to bear adequate warnings against use in those conditions where it might be dangerous to health in that the labeling failed to warn that its use might result in sterility and its use by individuals with early and incipient carcinoma of the prostate might result in acceleration of the malignant growth.
>
> 3. That said product was dangerous to health in that 25-mg. thereof as prescribed: 1-2 tablets daily, [59] would be dangerous to health in the aforesaid respects in violation of Section 502(j) of said Food, Drug and Cosmetic Act."

Clemens pointed out in his affidavit that during the criminal action he took the position that the symptoms referred to in Exhibit A attached to his affidavit [R. 101] and which was the subject of the mislabeling charge in

the criminal action, did no more than represent that the male hormone product would be efficacious in the treatment of those symptoms if the individual were suffering from a male hormone deficiency [R. 65]; that in support of the charges contained in the information, witnesses testified in substance as set forth in the affidavit [R. 66-94]. In his affidavit he alleged that immediately following the judgment of conviction he consulted with legal and other counsel with respect to the relabeling of the product "so as to conform to the objections made by the Government and disclosed by Government evidence in said criminal action" [R. 95] and in order to meet the objections so made by the Government during the course of that trial all of the former labeling was discarded and an entirely new label was redrafted [R. 95-97]. A copy of the labels so redrafted are attached to that affidavit as Exhibit B [R. 105].

Responding to the allegations in the complaint for injunction in action No. 10266-HW that 5 milligrams linguets of testosterone have no therapeutic value, he quoted from the United States Pharmacopoeia, listing the dosage of methyl testosterone as follows [R. 98]:

"Average dose: sublingual, 5 milligrams."

He quoted from the 14th Edition of "Useful Drugs, 1947" of the American Medical Association listing under methyl testosterone the average dosage:

"Dosage: Average dose, sublingual, 5 milligrams."

He also quoted from the American Medical Association publication "Epitome of the Pharmacopoeia of the United States" and from the "National Formulary, 8th Edition" listing under methyl testosterone the same dosage.

He alleged that the relabeling of those products as represented by Exhibit B was done in good faith and under expert counsel and advice to comply with the particulars in which the former labeling was contended in said criminal action to be deficient [R. 98].

With reference to the allegations of paragraph VI of the complaint for injunction in action No. 10266-HW [R. 5] he alleged that shortly after the judgment in the criminal action certain window and store displays remained there which had been there prior to the institution of the criminal action and this was because of the press of business imposed upon him in attempting to organize his business in such a manner that it would comply with the evidence and the judgment in the criminal action, but that at the time of the filing of the complaint in the injunction action all of those store displays had been taken down [R. 99]. He denied that in any advertising since the judgment in the criminal action had he represented in newspaper advertising that these drugs would be efficacious in alleviating a variety of diseases conditions or those relating to sexual impotence in men or change of life in women and he attached as Exhibit "C" [R. 106] a correct copy of the only advertisements that had appeared in any newspapers since the date of the judgment in the criminal action up to the date of his affidavit, October 14, 1949 [R. 99-100].

Mr. Clemens also submitted a supplemental affidavit [R. 119] in which he stated that with respect to the allegations in the complaint for injunction that 5 milligrams

per day of methyl testosterone have no therapeutic value [Paragraph X, Complaint for Injunction; R. 7], no charge or claim was made in the criminal information that 5 milligrams of this product had no therapeutic value, though Counts 12, 13 and 14 of the information [R. 315-323] concerned a 5 milligram product. He also alleged that the prescription received by Hazen S. Parkinson from Dr. Norris J. Heckel was 5 milligrams per day.

Another supplemental affidavit was filed by Mr. Clemens in the injunction action alleging a purchase by him of 3 bottles each of Dr. Pierce's Favorite Prescription, Dr. Pierce's Golden Medical Discovery, Dr. Miles Nervine and Lydia E. Pinkham's Vegetable Compound [R. 107]. Attached to that affidavit was the carton in which one of the bottles of Dr. Pierce's Favorite Prescription was contained and this carton was Exhibit A to that affidavit [R. 109]. Enclosed within the carton was a pamphlet attached to the affidavit as Exhibit B [R. 110-111]. Also attached to the affidavit was the carton in which the bottle of Dr. Pierce's Golden Medical Discovery was contained and this carton was attached as Exhibit C [R. 112]. The carton in which the Lydia E. Pinkham Vegetable Compound was contained was attached to the affidavit as Exhibit D [R. 113]. Inside the carton of this product was a circular attached to the affidavit as Exhibit B [R. 114-115]. The carton in which Dr. Miles Nervine was contained was attached as Exhibit F to the affidavit [R. 116] and the circular within the carton was attached as Exhibit G [R. 117-118].

(e) Affidavit of Allen H. Parkinson.

An affidavit was filed by Allen H. Parkinson in the injunction action, No. 10391-HW [R. 199]. Mr. Parkinson analyzed in detail the counts of the information in the criminal action, No. 20642-HW, in which he had been a defendant [R. 200-205]. He alleged that no charge was made in that information that adequate warnings against the use of those products under certain conditions did not appear on the labeling and that his labeling contained a warning statement was apparently deemed sufficient by the Government [R. 205]. There was also attached to his affidavit as Exhibit A the leaflet that had been the subject of the mislabeling charge in the criminal action [R. 243]. There was also attached another leaflet subject of the charge in the criminal action, as Exhibit B to his affidavit, in which a warning statement appeared which was apparently deemed sufficient by the Government in that action [R. 249]. He recapitulated the charges in the information against him so far as material to the injunction case as follows [R. 206]:

> "Recapitulating the aforesaid charges insofar as the same are material to this litigation, the charges of the Government were that the labeling of said products so shipped constituted a misbranding of said products for the following reasons:
>
> 1. That said labeling falsely misrepresented and suggested that said products would be efficacious in the treatment of the conditions enumerated [202] heretofore as to Count I in violation of Section 502 (a) of the Food, Drug and Cosmetic Act.
>
> 2. That said labeling failed to bear adequate directions for use in that the directions contained on the label of the bottle were not adequate directions for use."

He also alleged that during the criminal action he took the position that the symptoms referred to in Exhibits A and B attached to his affidavit [R. 243-249] would be relieved if the individual manifesting same were suffering from a male hormone deficiency and that these leaflets did no more than make such a representation [R. 206]. In his affidavit he likewise summarized the testimony of the witnesses in the criminal action whose testimony appears in the transcript which was made part of the record before the court in the injunction action [R. 208-232]. He likewise alleged in his affidavit that following the judgment in the criminal action he consulted with expert counsel on the subject of relabeling so as to conform to the objections of the Government as disclosed by the Government evidence in the criminal action [R. 232]; that the labeling employed by him prior to the criminal action was discarded:

> "In order to eliminate the objections of the Government that said product should not be continued over a period of time unless under the supervision of a physician, in that sterility might be caused thereby or a carcinoma of the prostate might be accelerated in growth thereby, affiant caused to be placed on said label, among other things, language to the effect that said product should be taken, 1 tablet upon arising before breakfast, or 1 tablet shortly before retiring, and that 'the maintenance dosage can be extended from 3 to 6 months *under the supervision of a physician.* (Emphasis added.) [R. 234].
>
> "In order to overcome the objections made by the Government in said criminal action that an individual layman could not diagnose his need for said product, affiant caused also to be placed upon said label directions as follows:

" 'For use by adult males deficient in male hormone *when small dosages of male hormone are prescribed or recommended by a physician, for palliative relief of such symptoms.*' (Emphasis added.)

"As a further caution to users of said product that a physician should be consulted for the purpose of determining whether or not the symptoms manifested were the result of a male hormone deficiency, and further, explanatory of the label language above referred to that the product was to be used when 'prescribed or recommended by a physician,' affiant caused to be added to said label the following:

" 'It is impossible for a layman to determine whether he has a male hormone deficiency, as similar symptoms may be caused by other conditions. Therefore, before taking testosterone a physician should be consulted since testosterone will not aid or relieve symptoms not associated with male hormone deficiency.' "

He also alleged that in order to meet the objections and the testimony of some of the Government witnesses in the criminal case that should testosterone be taken by young men desirous of stimulating their sexual desire and ability, it might result harmfully to them unless under the guidance of a physician, he caused to be placed upon the labeling, the following [R. 235]:

"Children and young adults *must not use except under constant direct supervision of a physician.*" (Emphasis added.)

He also alleged in his affidavit that [R. 235]:

"In order to meet the objections of the Government and the testimony of witnesses produced by the Government in said criminal action in the case of United States v. El-O-Pathic Pharmacy, *et al.*, Claim No.

20596, that the labeling involved therein did not contain adequate warnings against the use of said product when carcinoma of the prostate was indicated and without adequate warnings of the use of said product might cause sterility, affiant caused to be placed on said labeling the following cautionary (226) language, and discarded the cautionary language formerly employed by him and contained on Exhibit 'A' and 'B' hereto (to which no objection was made in said criminal action):

" 'The male hormone should not be taken by anyone with carcinoma of the prostate or urinary retention probably due to carcinoma of the prostate, or by anyone with cardiovascular disease, defects of spermatogenesis, sterility whether absolute or partial, or debilitation due to disease. Caution should be exercised when taking hormones for long periods since they have been reported as inhibiting spermatogenesis. *Take only as directed.*' " (Emphasis added.)

With respect to the allegation in the complaint for injunction that linguets of 5 milligrams had no therapeutic value, paragraph VIII, Complaint [R. 171], he likewise referred to the same references as set forth in the affidavit of Clemens to the United States Pharmacopoeia the 14th Edition of "Useful Drugs, 1947" of the American Medical Association, and the publication of the American Medical Association entitled "Epitome of the Pharmacopoeia of the United States" and also the "National Formulary, 8th Edition" in which 5 milligrams was the suggested dosage [R. 236-237]. He also alleged that in the criminal action against him, No. 20596, Criminal, paragraphs 12, 13 and 14 [R. 315-323] involved linguets of 5 milligrams but that

no charge was made in that information or during the course of trial that linguets of 5 milligrams had no therapeutic value [R. 237].

Mr. Parkinson also alleged in his affidavit [R. 230] that following the complete revision of his labeling he mailed circulars to retail druggists throughout the United States soliciting their business for the purchase from him of the product so relabeled. In this connection he mailed thousands of circulars to retail druggists doing business solely within the state of California; that the majority of these druggists were members of the Southern California Pharmaceutical Association, Ltd., and that these druggists requested advice of that association whether such product might be sold by them over the counter without a prescription; that these inquiries were prompted by reason of the fact that following the conclusion in the criminal action articles appeared in national and local drug journals advising of the outcome of the criminal actions and stating that as a result of the judgment therein the product could not be sold except on prescription; that upon receipt of said inquiries from these druggists, the Southern California Pharmaceutical Association, Ltd., on September 15, 1949, addressed a letter to Robert S. Roe, Chief of the Los Angeles District of the Food and Drug Administration enclosing copy of the circulars sent to these druggists by Mr. Parkinson and stating that their members requested advice as to whether the products could be sold over the counter without being subject to prosecution by the Food and Drug Administration; that within a few

days after receipt of that letter, Mr. Roe addressed a letter, in words and figures as follows [R. 241]:

"Dear Mr. Baird:

"I have your letter of August 29, transmitting copies of advertising folders that have been distributed to Pharmacists throughout Southern California. This material offers Hormones for over the counter sale and you request my comment on the application of the Federal Food, Drug and Cosmetic Act.

"It is our view that products containing significant amounts of hormones are not suitable for over the counter distribution, because adequate directions for use and adequate warnings can not be devised that will enable the safe and effective use of such products by the lay person. Consequently, such preparations should be reserved for prescription use. The over-the-counter sale of such products received in interstate commerce would constitute a violation of the Federal Act.

"It is our view that products containing Therapeutically insignificant amounts of hormones would be worthless and labeling (231) representing them as hormone preparations or as preparations intended for use in treating hormone deficiencies would be misleading.

"Very truly yours,

ROBERT S. ROE,

Chief, Los Angeles District."

Mr. Parkinson then alleged that following the exchange of correspondence mentioned, copies of the two letters referred to were sent to all member retail druggists and appeared as well in national and local drug journals. He alleged on information and belief that the Food and Drug Administration had formed a policy to prevent the sale of

methyl testosterones except on prescription, whether or not there was any statute, rule or regulation preventing the sale except on prescription; that the Food and Drug Administration intended to continue to harass, annoy and oppress him by vexatious litigation in order that this policy might be carried into effect and in order that he might be placed in a position where he could no longer continue financially; that Mr. Roe's letter was calculated and intended to destroy Mr. Parkinson's retail outlets during the pendency of this litigation notwithstanding the fact that any and all transactions had or contemplated between Mr. Parkinson and druggists in California would be intrastate transactions and wholly removed from the jurisdiction of the Food and Drug Administration, and that Mr. Roe in his reply did not intimate or suggest that the question which was the subject of his letter was the question at that time and now involved in litigation before this court [R. 242-243].

(f) Affidavit of Eugene M. Elson.

An affidavit was filed in the injunction case, No. 10266-HW, by Eugene M. Elson, defense counsel [R. 49]. He alleged that he obtained from the Clerk of the United States District Court in which the action was pending the file in *U. S. v. Walter Kurt Max Hassenstein,* No. 19004, Criminal, that he examined all of the documents in the file and copied therefrom certain portions of those documents, that the defendant in that action was prosecuted for a violation of Sections 352(f)(1) and 352(f)(2), United States Code, the corresponding sections of which in the Federal Food, Drug and Cosmetic Act are Sections

502(f)(1) and 502(f)(2); that the information quoted the labeling involved as follows [R. 50-51]:

"Rx 5000

"Important

"To be used as directed by physician. Not to be used by children or when pregnant or (46) in the presence of serious diseases like diabetes, tuberculosis, cancer or when abnominal pains (stomach-ache, cramps, colic), nausea, vomiting (stomach sickness) or other symptoms of appendicitis are present. Ampules should not be used in cases of nephritis, myocarditis and arteriosclerosis and threatened rupture of the uterus. Frequent or continued use of this preparation may result in dependence on laxatives. * * *."

This affidavit further alleged that the information charged that Section 352(f)(1) U. S. C., was violated in that the label failed to reveal the reason for using the drug; that Section 352(f)(2) U. S. C., was violated in that the "drug contained a solution of Posterior Pituitary and the statement, to-wit 'should not be used in cases of nephritis, myocarditis and arteriosclerosis' in the labeling was not adequate to warn against use of the drug in kidney disease, heart disease and hardening of the arteries, and in that the labeling of said drug bore no warning against use by persons with high blood pressure,'" that a motion to dismiss was filed with supporting points and authorities; that the Government filed points and authorities in opposition thereto which stated in part [R. 51-53]:

"With respect to the alleged misbranding in violation of Section 352(f)(1) (Section 502(f)(1), Federal Food, Drug and Cosmetic Act) defendant rests his Motion to Dismiss upon the contention that nothing in that Section of the Act requires the labeler

to reveal the reason for the use of (47) the article, particularly since the labeling contained the statement that the preparation was to be 'used as directed by physician.' Plainly, if it is required that the labeling set forth the reasons or conditions for which the drug is to be used, such requirement is not fulfilled by a statement that it is to be used as directed by a physician. Moreover, such a direction is ambiguous and provides no assurance that the purchaser will consult a member of the medical profession. The regulations promulgated under Section 352(f)(1) (502(f)(1), Federal Food, Drug and Cosmetic Act) provide for an exemption of the requirement that the labeling contain adequate directions for use if, among other things, the labeling of the drug bears the statement 'Caution: To be dispensed by or on the prescription of a physician (21 Fed. Reg. (Com. Supp.) Section 2.106(b)(4)).' Defendant has not taken advantage of this exemption but, rather, has carefully avoided it. Compliance with the requirements of the exemption would assure the direction and guidance of a physician in the use of the drug. The statement, however, placed on the drug by defendant does not, as stated, give any such assurance. Thus, the situation presented is apparently one where the drug is so dangerous in its use that the advice of a physician is ambiguously suggested, but the language which would insure the drug's use on the instruction of a (48) physician is absent."

That the points and authorities of the Government continued further at considerable length on the theme that Section 352(f)(1), U. S. C., required labeling to state the conditions under which it was to be used and that the warning on the labeling used words unknown and "mysterious" to the average user. In reply to the Gov-

ernment's points and authorities, the defendant filed further points and authorities, stating in part that [R. 53]:

> "When there is taken into consideration also the fact that the pleading sets forth that the product is to be used 'as directed by physician,' there can be no intimation that the statement was not inserted as a warning against the use of the product except as designated by the physician * * *."

The defendants' points and authorities further stated in part:

> "The matter of describing cases of 'nephritis, myocarditis and arteriosclerosis' and the allegation that these diseases should be described as 'kidney, heart disease and hardening of the arteries, respectively, has no precedence in our law. It would cause a criminal act to arise if, in the whimsy or caprice of a Government official the identical words approved by the Government were not used, * * *."

Thereafter the District Court rendered its opinion entered in the minutes of the court as follows [R. 54-55]:

> "Hall, J.:
>
> "The statement on the label 'Important. To be used as directed by physician,' is in my judgment an 'adequate direction' for the use of the product. It is not to be used at all unless a physician directs it. To put more on the label would be to suggest it could be used without the direction of a physician which would be more apt to be false and misleading than the simple statement as used.
>
> "The words 'nephritis, myocarditis and arteriosclerosis' are dictionary words which are commonly understood to mean certain types of kidney, heart or arterial diseases. The warning that the product should not be used in such cases appearing under the

word Important together with the statement, 'To be used as directed by physician,' is an 'adequate warning' sufficient to comply with the statute as to all except children, and is not false or misleading.

"As to the 'adequate warning against its use by children' I do not know how a more adequate warning could be given on a label than the statement 'not to be used by children.'

"The motion to dismiss is granted."

5. REBUTTAL EVIDENCE.

(a) Affidavit of Lewis A. Schinazi.

An affidavit was executed by Lewis A. Schinazi, an inspector of the Food and Drug Administration, in case No. 10266-HW, on November 3, 1949. The affidavit was obviously intended to rebut the allegations of the Clemens affidavit concerning the relabeling of the product after the criminal case [R. 94] and to create the inference that the labeling was merely a subterfuge. In his affidavit he alleged that he made a purchase on August 9, 1949, of a carton of methyl testosterone from Mr. Clemens, the defendant in action No. 10266-HW, at the place of business of defendant in that case; that the salesman asked him for his name and address, stating that he wished to inform him (the affiant) about new products in the field which might be of interest to him; that on November 2, 1949, he received through the mail from Vita-Pharmacals, Inc., the successor to El-O-Pathic Pharmacy, some documents, consisting of three circulars

attached as exhibits to his affidavit, one a price list and another a circular pertaining to a product called "Retarder" and a circular concerning an introductory offer on hormone products [R. 120-123].

(b) Affidavit of Albert H. Wells.

This affidavit was executed by Wells, a chemist with the Food and Drug Administration, and was obviously executed to rebut the contentions of the defendants that the relabeling was done in good faith and that the new label was intended by them to mean what it said (see Clemens Affidavit [R. 94-100]). This affidavit alleged the purchase of male hormone products on November 22, 1949, alleged a conversation with the salesman at the store of the defendant, Vita-Pharmacals, and another conversation on November 23, 1949, with a clerk in the store. This affidavit was filed November 23, 1949 [R. 131-136].

(c) Supplemental Affidavit of Robert S. Roe.

Robert S. Roe executed a Supplemental Affidavit December 1, 1949, alleging that during October and November of that year he conducted two investigations "to ascertain whether the labeling of the male hormone products distributed by Vita-Pharmacals Company, *et al.,* defendants in the above entitled proceedings, in fact caused purchasers to consult physicians before taking the drug" and attached to his affidavit were affidavits of individuals who had been contacted by inspectors under his supervision on that subject [R. 136-147].

Obviously this affidavit was for the single purpose to determine whether people who bought the product paid any attention to the label and, as we shall point out in our brief, was of the rankest type of hearsay and of no evidentiary value whatever.

(d) Affidavit of Walter F. McRae.

Mr. McRae was Acting Chief of the Los Angeles District, Food and Drug Administration. His affidavit was executed in rebuttal to the Supplemental Affidavit of Clemens, attaching cartons of Dr. Pierce's Favorite Prescription, Dr. Pierce's Golden Medical Discovery, Lydia E. Pinkham's Vegetable Compound, and Dr. Miles Nervine [R. 107-118].

Mr. McRae's affidavit alleged that a seizure action was pending in Pennsylvania against the Dr. Pierce remedies, that the Lydia E. Pinkham preparation is currently under investigation. There was attached to his affidavit an advertisement which he alleged appeared in the Los Angeles Times on January 22, 1950, purchased by the defendants, Vita-Pharmacals, Inc. Apparently the purpose of this inclusion was on the theory that the relabeling of the products was a subterfuge [R. 128]. This affidavit also attached a copy of a letter dated January 16, 1950, addressed to the California State Board of Pharmacy by the Director of Public Health of that state urging the Board to declare, among other things, that testosterone was a dangerous drug and should only be sold on prescrip-

tion. His affidavit further stated that commencing February 7, 1950, hearings would be held by the Board on the question. Apparently the purpose of including this letter was to create the inference that the Director of Public Health was of the same view as the Government. Mr. McRae's affidavit was sworn to January 27, 1950 [R. 126-131].

Under the stipulation as to the record in action No. 10266-HW, the Supplemental Affidavit of Robert S. Roe, above referred to [R. 136], the Affidavit of Wells, the Affidavit of McRae and the transcript of the evidence, including exhibits in the criminal cases, were made part of the record in this injunction action, subject to any objections as to relevancy and materiality [R. 150].

In the injunction action against the Hudson Products Company, No. 10391-HW, the above referred to Supplemental Affidavit of Roe, the Affidavit of McRae, and the transcript of the evidence, including exhibits in the criminal cases, were made part of the record subject to objections as to relevancy and materiality [R. 266].

It was further stipulated, however, in this action against Hudson Products Company that none of the evidence in the transcript pertaining to the alleged danger of using testosterone under certain circumstances was introduced as against Allen H. Parkinson, defendant in action No. 20642, Criminal, and there was no charge by the Government in that action that the warning statement on the labeling involved in that action which related to the product sold by him was inadequate [R. 266].

(e) Testimony of Dr. Elwyn Terrill.

This doctor was called on rebuttal to rebut the testimony of the defense witnesses to the effect that it was general practice, at least in the Los Angeles area, for general practitioners to prescribe testosterone when called upon to do so, without in any way submitting the patient to the elaborate tests mentioned by the Government witnesses. He testified at the criminal case and stated that he practiced in Los Angeles and in his practice prescribes testosterone occasionally in limited field and that he takes a very careful history on all patients and examines them completely before prescribing it [R. 925]. Among his circle of friends he knows that those precautionary measures are generally taken in the profession [R. 926]. He was asked the following:

> "Q. Now, if I told you that a man of about 65 years called on each of the doctors whose names appear on the prescription pads that you have examined and told them that he wanted a refill of this bottle of Metandren Linguets, which is Defendants' Exhibit K, 500 Metandren Linguets, and that each one of those doctors wrote a prescription for this gentleman without laying a hand upon him, would that change your opinion in any respect as to the ordinary course of practice pursued by doctors in this locality in the use of testosterone? A. I wouldn't think that was general practice in my community, at least not among my associates."

His office is in the same building in which the Food and Drug Administration offices are located [R. 928].

IV.

APPLICABLE REFERENCES TO THE LEGISLATIVE HISTORY PRECEDING THE ENACTMENT OF THE FOOD, DRUG AND COSMETIC ACT PERTINENT TO THE CONGRESSIONAL INTENT AS TO THE MEANING OF "ADEQUATE DIRECTIONS FOR USE" AND "ADEQUATE WARNINGS."

The references to the legislative history which follow in this portion of the Appendix have been taken in their entirety with one exception, from a book entitled "Federal Food, Drug and Cosmetic Act—A Statement of its Legislative Record" prepared by Charles Wesley Dunn of the New York Bar and published by G. E. Stechert & Company in 1938. This book compactly and in one volume gives the entire legislative record of the Act, including reports in the House and in the Senate and the debates and covers the five year journey of this Act through the Congress until its final enactment in 1938. For convenience the references in the footnotes to the portions of this book will be for example to "Dunn, page ....."

As introduced in the Senate in 1933,[1] Section 8 of S. 1944 provided that a drug should be deemed misbranded:

> "(d) If it is not subject to the provisions of paragraph (i) of this section, and its labeling fails to bear complete and explicit directions for use: *Provided,* That the Secretary may by regulation exempt any drug from any requirement of this paragraph if he deems such requirement unnecessary for the protection of public health."

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[1]Dunn, p. 41.

That Bill died in the Senate Committee and was superseded by S. 2000, 73rd Congress, Second Session.[2]

At the Senate hearings on S. 1944, W. G. Campbell, then Commissioner of Food and Drugs, stated concerning subparagraph (d) of Section 8, above quoted, as follows:

> "*Paragraph (d) is merely to require that directions for use be stated on drug labels,* that paragraph (d), of course, should be read in connection with section 4(a), which refers to the use of drugs. *It makes compulsory the use of a label.*"[3] (Emphasis added.)

Section 8 of S. 2000, 73rd Congress, provided that a drug should be deemed misbranded:[4]

> "(d) If its labeling fails to bear, plainly and conspicuously, complete and explicit directions for use: *Provided,* That where any requirement of this paragraph, as applied to any drug, is not necessary for the protection of the public health, the Secretary shall promulgate regulations, as provided by section 22, exempting such drug from such requirement.
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> "(e) If its label fails to bear (1) such warnings as may be prescribed by regulations, as provided by section 22, against use in such pathological conditions or by children where its use is contraindicated and may be dangerous to health, or against unsafe dosage or methods of administration or application; and (2) the common or usual name of the drug, if any there be: *Provided,* That subdivision (2) of this paragraph shall not apply to drugs subject to paragraph (b) of section 4."

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[2]Dunn, p. 50

[3]Dunn, pp. 37, 1083.

[4]Dunn, pp. 56-57.

That Bill died in committee and was superseded by S. 2800, 73rd Congress, Second Session.[5]

The superseding Bill—S. 2800—73rd Congress, Second Session, provided in Section 8 as follows:[6]

> "(e) If its labeling fails to bear plainly and conspicuously (1) complete and explicit directions for use, and (2) such warnings in such manner and form as may be prescribed by regulations, as provided by section 22, against use in such pathological conditions or by children where its use is contraindicated and may be dangerous to health, or against unsafe dosage or methods of administration or application: *Provided,* That where any requirement of subdivision (1) of this paragraph, as applied to any drug, is not necessary for the protection of the public health, the Secretary shall promulgate regulations, as provided by section 22, exempting such drug from such requirement."

The report in the Senate on S. 2800, 73rd Congress, stated as follows:[7]

> "Paragraph (e) requires that the labeling of drugs bear complete and explicit directions for use. Such information is usually necessary to the proper administration or use of drugs, *but where it is not necessary* authorization is provided for exemption from any requirement of this paragraph through the operation of the Public Health Committee. (Emphasis added.)

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[5]Dunn, p. 67.

[6]Dunn, p. 76.

[7]Dunn, p. 123.

"This paragraph also defines a drug as misbranded if its labeling fails to bear such warnings, as may be prescribed by regulations set up through the operation of the Public Health Committee under section 22, against use in such pathological conditions or by children where its use is contraindicated and may be dangerous to health, or against unsafe dosage or methods of administration or application. There are many valuable drugs which must be administered with great care. They are just as potent for harm as for good. The mere giving of directions for use may not avert tragedy resulting from likely misuse, *unless accompanied by positive warnings.* For example, a patient suffering from asthma may take a potassium iodide preparation for the relief of the paroxysms, but if he has an arrested case of tuberculosis the drug may quickly render it dangerously active. Or the last doses of a bottle of worm medicine given without shaking before each dose may be fatal to children because the potent principle settles out on standing." (Emphasis added.)

Senator Copeland, the author of the new Food and Drug law,[8] offered his own statement regarding this Bill and what he conceded it to be.[9]

With reference to the subject of directions for use and warnings, he stated:[10]

"There are many very useful drugs which should be employed only with great care and discretion because in improper dosage or when administered to children or when the patient is suffering from certain

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[8]Dunn, p. 37.

[9]Dunn, p. 159.

[10]Dunn, p. 162.

disease complications the effect of these drugs may be disastrous. *S. 2800 provides an effective safeguard against these dangers* which cannot be controlled under the present law. It requires that all drugs bear explicit directions for use and appropriate warnings against their consumption by children or in certain disease conditions where the use is contraindicated and may be dangerous to health." (Emphasis added.)

With respect to Section 9(a) of S. 2800, which section dealt with false advertising, Mr. Campbell also stated:[11]

"And let me stop just at this point to comment upon the criticism so extensively voiced by the patent-medicine interest that the purpose of this bill is to stop self-medication. This paragraph (a) of section 9 would certainly be unnecessary if it were not contemplated that self-medication will continue in the future as it has in the past. Physicians do not need such information; nor would they need but little of the information required by the succeeding paragraphs of this section. All of the provisions dealing with drugs, aside from those recognized in the official compendia, are directed towards safeguarding the consumer who is attempting to administer to himself. If this measure passes, self-medication will become infinitely more safe than it has ever been in the past."

Senator Copeland also stated in presenting this Bill that:[12]

"There is no more common or mistaken criticism of this bill than that it denies the right of self-

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[11]Dunn, p. 1195.

[12]Dunn, pp. 89-90.

medication, or, as the objector usually put it, 'You can't take an aspirin tablet without a doctor's prescription.' Nothing could be further from the truth. The proposed law simply contributes to the safety of self-medication by preventing medicines from being sold as 'cures' unless they really are cures. It requires that drugs which have only palliative effect shall say as much on the label."

At the hearings before a subcommittee of the House committee on interstate and foreign commerce on S. 5, 74th Congress, First Session, Mr. Campbell also testified. He indicated that the purpose of the authority to exempt from the requirement of adequate directions was to eliminate the necessity of drugs or products to be used in compounding prescriptions—which is actually one of its applications under the regulations promulgated under Section 502 of the Act (21 U. S. C. 352)[13]—but he did not forecast any such extensive rules as those affecting drugs which the Food and Drug Administration regards as unsafe or inefficacious for use except under medical supervision.[14]

S. 5, as reported in the 74th Congress, with the Senate committee's substitute report, provided that a drug would be deemed to be misbranded if it were dangerous to health under the conditions of use prescribed in its labeling or advertising. The report stated in this regard:[15]

"* * * *There are no useful products which would be barred from the market under this provision, since labeling with proper directions for use*

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[13]Regulations, Sec. 1.106, Title 21, Code of Federal Regulations (1949 Edition), p. 17.

[14]Dunn, p. 1235.

[15]Dunn, p. 483.

would remove any worth-while article from this ban. Under the present law, which contains no provision of this character, there have come on the market a number of dangerous drugs from the use of which many authenticated cases of death and impairment of health have been reported. So long as their labels bore no false or misleading statements, the public could not be protected.

"* * * *It is not intended that this provision should ban the sale of useful drugs of this kind when they are appropriately labeled.*" (Emphasis added.)

It would be presumed that if the committee had thought that certain essential drugs might be characterized as so unsafe that proper labeling could not be devised for them, it would at that point have said so, but no reference has been found in the history of later versions of S. 5 which would be indicative of such an understanding.

It is believed that it may be properly assumed that Section 502(f)(2) of the Act (21, U. S. C. 352(f)(2)) requiring warnings against possible misuse was regarded by the Congress and the committees as sufficient protection of consumers against misuse of the class of drugs which the Food and Drug Administration now contends must, under Regulation, Section 1.106, *supra,* bear the prescription legend. There are repeated statements and committee reports and by sponsors of the several bills that the purpose of the section was to guard against misuse of "potent" drugs.[16]

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[16]S. Rep. 493, 73d Cong., 2d Sess., Dunn, p. 123.

Statement of W. G. Campbell in hearings before a subcommitee of the Senate Committee on Commerce on S. 5, 74th Cong., 1st Sess., Dunn, p. 1226.

Letter of the Secretary of Agriculture contained in a minority report on S. 5, S. Rep. 2139, 75th Cong., Dunn, p. 837.

Some of the earlier bills leading to the enactment of the present Food, Drug and Cosmetic Act provided that advertisements for certain named diseases "wherein self-medication may be especially dangerous" should be deemed false except when disseminated to the medical profession.[17] No comparable provision is in the existing Act.

Senator Copeland, in a statement referring to such a provision in S. 5, recognized certain criticisms of the profession arising from a fear that an individual "would no longer be permitted to buy any favorite prescription *and to take it under the direction of the label,*" and he said *"Of course, that was not the intent of the proposed law."*[18] (Emphasis added.)

S. 2800, 73rd Congress, died on the Senate Calendar.[19] Then S. 5, 74th Congress, First and Second Sessions, succeeded S. 2800, of which it was a revision.[20]

Section 402 of that Bill provided that a drug should be deemed misbranded:[21]

> "(f) If its labeling fails to bear plainly and conspicuously (1) complete and explicit directions for use, and (2) such warnings in such manner and form as may be prescribed by regulations, as provided by sections 701 and 703, against use in such pathological conditions or by children where its use is contradicted and may be dangerous to health, or against unsafe

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[17]S. 1944, 73d Cong., 1st Sess., Sec. (c), Dunn, p. 42; S. 2000, Dunn, p. 58; S. 2800, Dunn, p. 77; S. 5, Dunn, p. 200.

[18]79th Congressional Record, part 1, 150.

[19]Dunn, p. 188.

[20]Dunn, p. 189.

[21]Dunn, p. 197.

dosage or methods or duration of administration or application: *Provided,* That where any requirement of subdivision (1) of this paragraph, as applied to any drug, is not necessary for the protection of the public health, the Secretary shall promulgate regulations, as provided by sections 701 and 703, exempting such drug from such requirement."

Certain amendments were made to S. 5 by the committee on commerce and the Bill, with the amendments, was reported in the Senate.[22]

Section 402 of the amended Bill provided in part as follows:[23]

"(f) If its labeling fails to bear plainly and conspicuously (1) complete and *adequate* directions for use, and (2) such warnings in such manner and form as may be prescribed by regulations, as provided by sections 701 and 703, against use in such pathological conditions or by children where its use may be dangerous to health, or against unsafe dosage or methods or duration of administration or application: *Provided,* That where any requirement of subdivision (1) of this paragraph, as applied to any drug is not necessary for the protection of the public health, the Secretary shall promulgate regulations, as provided by sections 701 and 703, exempting such drug from such requirement."

The report in the Senate of this Bill provided with respect to subdivision (f) as follows:[24]

"Paragraph (f) requires that the labeling of drugs bear complete and adequate directions for use. Such

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[22]Dunn, p. 213.
[23]Dunn, p. 220.
[24]Dunn, p. 254.

information is usually necessary to the proper administration or use of drugs, *but where it is not necessary* authorization is provided for exemption from any requirement of this paragraph through the operation of the Public Health Committee. (Emphasis added.)

"This paragraph also defines a drug as misbranded if its labeling fails to bear such warnings, as may be prescribed by regulations set up through the operation of the Public Health Committee, against use in such pathological conditions or by children where its use may be dangerous to health, or against unsafe dosage or methods or duration of administration or application. There are many valuable drugs which must be administered with great care. They are just as potent for harm as for good. The mere giving of directions for use may not avert tragedy. For example, a patient suffering from asthma may take a potassium iodide preparation for the relief of the paroxysms, but if he has an arrested case of tuberculosis the drug may quickly render it dangerous active. Or the last doses of a bottle of worm medicine given without shaking before each dose may be fatal to children because the potent principle settles out on standing. *Warnings against probable misuse are therefore essential to public-health protection.*" (Emphasis added.)

A substitute report on S. 5, 74th Congress, was submitted in which was stated[25] substantially the same as that contained in the quotation immediately preceding.

During the debate in the Senate on S. 5, 74th Congress, an amendment was offered to strike out "prescribed by

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[25]Dunn, p. 484.

regulations, as provided by Sections 701 and 703" and insert "adequate" so as to read:[26]

> "(g) If its labeling fails to bear plainly and conspicuously (1) complete and adequate directions for use, and (2) such warnings in such manner and form as may be adequate against use in such pathological conditions or by children where its use may be dangerous to health, or against unsafe dosage or methods or duration of administration or application: *Provided,* That where any requirement of subdivision (1) of this paragraph, as applied to any drug or device, is not necessary for the protection of the public health, the Secretary shall promulgate regulations, as provided by sections 701 and 703, exempting such drug from such requirement."

This amendment was agreed to by the Senate.[27]

This Bill as reported in the House, revised completely S. 5 and, as reported in the House, provided in part that a drug should be deemed misbranded:[28]

> "(g) If its labeling fails to bear plainly and conspicuously (1) adequate directions for use, or (2) such warnings, in such manner and form, as are required by regulations prescribed by the Secretary, against use in those pathological conditions or by children where its use may be dangerous to health, or against unsafe dosage or methods or duration of administration or application: *Provided,* That where any requirement of subdivision (1) of this paragraph, as applied to any drug or device, is not necessary for the protection of the public health, the Secretary shall

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[26]Dunn, p. 499.

[27]Dunn, p. 499.

[28]Dunn, p. 538.

promulgate regulations exempting such drug or device from such requirement."

The report in the House of S. 5, 74th Congress, stated with reference to the section under consideration as follows:[29]

> "Section 402(g): In this paragraph as it passed the Senate a drug or device is deemed to be misbranded unless its labeling bears such warnings in such form and manner as may be adequate. The committee changed this to require such warnings as are required by regulations prescribed by the Secretary; its reason for so doing being that it believed that the requirement of the Senate bill was so vague that it might be held to be invalid. Certainly the manufacturers of drugs and devices would have had grave difficulty in telling what warnings would have been 'adequate' on the labeling of many products."

The Senate agreed to the House amendment.[30]

S. 5 of the 74th Congress died in the House.[31]

S. 5, 75th Congress, as introduced in the Senate, provided that a drug should be deemed misbranded:[32]

> "(g) If its labeling fails to bear plainly and conspicuously (1) adequate directions for use, or (2) adequate warnings against use in those pathological conditions or by children where its use may be dangerous to health, or against unsafe dosage or methods or duration of administration or application: *Pro-*

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[29]Dunn, p. 555.

[30]Dunn, p. 605.

[31]Dunn, p. 633.

[32]Dunn, p. 648.

vided, That where any requirement of subdivision (1) of this paragraph, as applied to any drug or device, is not necessary for the protection of the public health, the Secretary shall promulgate regulations exempting such drug or device from such requirement."

The report in the Senate stated that with respect to this Bill, that among other things it:[33]

> "Requires adequate directions for use of drugs and devices and appropriate warnings against their probable misuse through overdosage, or by children, or in disease conditions where they may be dangerous."

As recommended by the House subcommittee, Section 502(f) of S. 5, 75th Congress, reads as follows:[34]

> "(f) Unless its labeling bears (1) adequate directions for use; and (2) such warnings against use in those pathological conditions or by children where its use may be dangerous to health, or against unsafe dosage or methods or duration of administration or application, in such manner and form, as the Secretary finds necessary for the protection of users and by regulations prescribes: *Provided,* That where any requirement of clause (1) of this paragraph, as applied to any drug or device, is not necessary for the protection of the public health, the Secretary shall promulgate regulations exempting such drug or device from such requirement."

S. 5, 75th Congress, as reported in the House, followed the Bill as recommended by the House subcommittee, so far as Section 502(f) above quoted is concerned.[35]

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[33]Dunn, p. 680.
[34]Dunn, p. 764.
[35]Dunn, p. 805.

The report in the House of S. 5, 75th Congress, stated that one of the principal respects in which the Bill differs from the present law is that:[36]

> "Potent drugs liable to be misused must bear label warnings against probable misuse."

This same report also states as follows:[37]

> "Other provisions of section 502 are designed to require the labeling of drugs and devices with information essential to the consumer. *The bill is not intended to restrict in any way the availability of drugs for self-medication. On the contrary, it is intended to make self-medication safer and more effective. For this purpose provisions are included in this section requiring the appropriate labeling of habit-forming drugs, requiring that labels bear adequate directions for use and warnings against probable misuse,* and setting up appropriate provisions for deteriorating drugs." (Emphasis added.)

The statement of the Managers on the part of the House[38] was read and stated the important changes from the House amendment, one of them being with regard to warnings.[39]

> *"Warnings against misuse of drugs and devices.*— Under the House amendment a drug or device is considered misbranded unless its labeling bears such warnings against use in pathological conditions or by

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[36]Dunn, p. 816.

[37]Dunn, p. 822.

[38]Dunn, p. 992.

[39]Dunn, p. 995.

children where its use may be dangerous to health or against unsafe dosage or methods or duration of administration or application, in such manner and form as the Secretary finds necessary for the protection of users and by regulations prescribes. Under the conference agreement a drug or device is considered misbranded unless its labeling bears such adequate warnings in the cases specified in the House amendment as are necessary for the protection of users."

With respect to the subsection under consideration and during the discussion in the House in which the House agreed to the conference report as to S. 5, 75th Congress, Senator Lea, one of the principal proponents in the Senate of this Bill, stated in part as follows:[40]

> "The conferees also agreed upon a provision requiring adequate warnings upon the label against use in certain pathological conditions or by children where its use may be dangerous to health, or against unsafe dosage or duration of use. *The substance of the change as agreed to by the conference is that the warning must be 'adequate' instead of being prescribed by regulations of the Secretary. The Secretary, however, can prescribe exemptions to those regulations on the ground of impracticability.*" (Emphasis added.)

The Bill as introduced in the Senate, S. 5, 74th Congress,[41] quoted *supra* (page 69 of this Appendix) was

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[40]Dunn, p. 999.

[41]Dunn, p. 197.

also referred to by Mr. Campbell during Senate hearings on this Bill. With reference thereto Mr. Campbell stated.[42]

> "Suggestion has been made that paragraph (f) be deleted. This proposal is advanced in the understanding that paragraph 401(a)(1) makes paragraph (f) unnecessary; 401(a)(1) deals with products which are of a toxic or poisonous character and with directions for their use. Paragraph (f) relates more to the precautions which should be expressed against the misuse of potent drugs. This is particularly true in the sale of powerful sedative drugs, particularly those which affect the heart. The consumer will ordinarily be without knowledge of the consequence of a too frequently repeated use and might be induced, in fact frequently is induced, through securing partial relief from the first dose, to repeat or increase the dose, to his very definite injury. *A precautionary statement against misuse in this manner should be carried in a conspicuous portion of the labeling of such products.*" (Emphasis added.)

In a letter from the Secretary of Agriculture to the Senate November 25, 1937, the Secretary requested that in order "to protect the public from drugs which, like the 'elixir,' are dangerous because of their inherent toxicity, it is the Department's recommendation that legislation be enacted to provide at least the following:[43]

> "3. Requirement that drug labels bear appropriate directions for use and warnings against probable misuse. Much injury results from insufficient directions

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[42]Dunn, p. 1226.

[43]Dunn, p. 1326.

and from lack of warning against overdosage, or administration to children, or use in disease conditions where the drug is dangerous, or possibility of drug addiction."

81st Congress
2d Session

S. 3852

A Bill

To amend section 503(b) of the Federal Food, Drug, and Cosmetic Act.

By Mr. Humphrey

June 29 (legislative day, June 7), 1950

Read twice and referred to the Committee on Labor and Public Welfare

81st Congress
2d Session

S. 3852

In the Senate of the United States
June 29 (legislative day, June 7), 1950

Mr. Humphrey introduced the following bill; which was read twice and referred to the Committee on Labor and Public Welfare

A Bill

To amend section 503(b) of the Federal Food, Drug, and Cosmetic Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assem-

bled, That subsection (b) of section 503 of the Federal Food, Drug, and Cosmetic Act, as amended, is amended to read as follows:

"(b) A drug dispensed by filling or refilling a written or oral prescription of a physician, dentist, or veterinarian licensed by law to administer such drug shall be exempt from the requirements of section 502, except paragraphs (a), (i) (2) and (3), (k), and (l), and the packaging requirements of paragraphs (g) and (h), if the drug bears a label containing the name and address of the dispenser, the serial number and date of the prescription, or of its filling, the name of the prescriber, and, if stated in the prescription, the name of the patient, and the directions for use and cautionary statements, if any, contained in such prescription. This exemption shall not apply to any drug dispensed in the course of the conduct of a business of dispensing drugs pursuant to diagnosis by mail or otherwise without examination of the patient. If the drug is intended for use by man and—

'(1) is a habit-forming drug subject to the regulations prescribed under section 502(d), or

'(2) has been found by the Administrator, after investigation and opportunity for public hearing, to be unsafe or ineffective for use without the professional diagnosis or supervision of a physician or dentist, or

'(3) if an effective application under section 505 limits it to use under the professional supervision of a physician or dentist,

such exemption shall apply only if such drug is dispensed upon a written prescription of a physician or dentist licensed by law to administer such drug or upon an oral prescription of such physician or dentist which

the prescriber agrees to confirm in writing within seventy-two hours, or is dispensed by refilling a prescription if such refilling is authorized by the prescriber in the original prescription or by oral order and agreement of the prescriber to confirm such order in writing within seventy-two hours.

"The Administrator may by regulation remove drugs subject to section 502(d) from the provision of this subsection when such requirements are not necessary for the protection of the public health.

"A drug which is subject to clause (1), (2), or (3) of this subsection shall be deemed to be misbranded if at any time prior to dispensing its label fails to bear the statement 'Caution: Federal law prohibits sale or dispensing without prescription'.

"The act of dispensing a drug contrary to the provisions of this subsection shall be deemed to be an act which results in the drug's being misbranded while held for sale."